

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MAINE**

**FEDEQ DV004, LLC, and FEDEQ DV005,** ]  
LLC, Florida limited liability companies ]  
 ]  
Plaintiffs, ]  
 ]  
v. ]  
 ]  
**CITY OF PORTLAND,** a Maine body ]  
politic and corporate, ]  
 ]  
and ]  
 ]  
**JON. P. JENNINGS,** an individual, ]  
 ]  
Defendants. ]

**Case No.:**\_\_\_\_\_

**COMPLAINT**

Plaintiffs FEDEQ DV004, LLC (“Federated 04”) and FEDQ DV005, LLC (“Federated 05”) complain against Defendant City of Portland (the “City”) for injunctive relief, breach of contract, breach of the implied covenant of good faith and fair dealing in the context of a fiduciary relationship, declaratory relief, and fraudulent inducement and misrepresentation, and against Defendant Jon P. Jennings (“Mr. Jennings”) for tortious interference with a contractual relationship, and in support thereof allege as follows:

**INTRODUCTION**

Federated 04, Federated 05, and their related-party predecessors-in-interest including The Federated Companies, LLC (“TFC”), Legacy Park Apartments, LLC (“Legacy”), and FEDEQ DV001, LLC (“DV001”) (hereinafter collectively or individually, as the context requires, “Federated”) have spent nearly a decade and millions upon millions of dollars in vain developing

and pursuing plans for a vibrant mixed-use development project consistent not only with the City's comprehensive plan for its Bayside neighborhood, but also with the City's express request therefor. In early 2014, the parties' relationship reached its apogee when the City approved the first iteration of what one staff member later described as "likely the largest project in the history of the city"—a multi-tower urban development project consisting of parking, retail, housing and countless public benefits.

The City came under attack, however, when an administrative appeal of the decision it issued with regard to the Project was filed in Cumberland County Superior Court ("Superior Court") during the winter of 2014. The result was a settlement based upon a compromise calling for revisions to the above-described project and leading to a more modest plan consisting of 450 residential units, nearly 100,000 gross square feet of ground floor retail space, and structured parking for more than 800 vehicles.

As the project shrunk in size, the City's support for it correspondingly lessened, and the temper of the City's interactions with Federated noticeably changed.

In what would become a significantly detrimental pattern of 'bait and switch' ultimately leading to (1) failure to abide by relevant contractual obligations, (2) failure to pay sums rightfully due under said agreements, (3) expiration of project approvals, (4) denial of Federated's building permit application, and (5) a corresponding and massive deflation in Property value rising from all of the foregoing, the City ultimately abandoned Federated, its longstanding partner, and left the developer in the lurch.

After inflicting millions of dollars of damage upon Federated through its years-long pattern of imprudence and obstruction, the City finally repudiated the applicable agreements between it and Federated as an obvious act of seller's remorse and in an express attempt to retake valuable

real and intellectual property from Federated and extinguish its remaining rights in the same. The results have been nothing short of catastrophic for Federated and, equally and unfortunately, the public at large.

Federated now sues to enjoin the City from depriving it of rights the City has recognized for nearly a decade and for damages to remedy what it has lost as a result of the City's inability to adhere to the simple terms of a partnership it agreed to over and over again throughout the course of nearly one-tenth of a century.

### **PARTIES AND JURISDICTION**

1. This is an action with respect to the City for injunctive and declaratory relief, contractual rescission on the basis of a breach of the implied covenants of good faith and fair dealing and fraudulent inducement, and for breach of contract damages exceeding \$75,000.00 exclusive of interest, costs and attorneys' fees, and with respect to Mr. Jennings for tortious interference with a contractual relationship.

2. The Court has subject matter jurisdiction of this case pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1367 for pendent state law claims.

3. Plaintiffs Federated 04 and Federated 05 are single purpose Florida limited liability companies formed for the purpose of owning and developing real property which have their principal place of business in and are principally controlled and managed by a common individual residing in, Miami-Dade County, Florida.

4. Defendant City of Portland is a municipal corporation and the largest city in the State of Maine.

5. Defendant Mr. Jennings is a natural person upon information and belief residing in the City of Portland, County of Cumberland, State of Maine.

6. Venue is proper in this District because the relevant acts and transactions took place here, Defendants exist and conduct business here, and the real estate at issue in this action is located here.

7. All conditions precedent to bringing this action have been performed or waived.

8. By duly authorized entry into the agreements hereto relevant, the City has expressly waived sovereign immunity from suit, if any, on the claims asserted herein.

**GENERAL FACTS**  
**The Midtown Project**

9. Leading up to 2011, the City aggregated from private parties more than three acres of former scrap metal properties and railyards located along its Somerset Street (hereinafter, the “Property”) with the intent of transforming the same through the private construction of a new development project.

10. The subject project was intended as a lively mixed-use neighborhood to be located on the periphery of its urban core in an underdeveloped low-income community long planned by the City as a new gateway to downtown Portland.

11. Originally dubbed ‘Maritime Landing’, the project is now known as ‘MiDTOWN’ [SIC] (hereinafter, “Midtown”, or the “Project”).

12. As originally conceptualized, Midtown called for up to eight-hundred fifty (850) of the nine-hundred forty (940) new housing units envisioned by the City’s comprehensive plan for its Bayside neighborhood known as ‘A New Vision for Bayside’, spread across seven (7) high-rise apartment towers.

13. In 2011, the City selected Federated to acquire said Property and develop said Project.

14. Federated's decision to move forward with the purchase of the Property and development of the Project was based on the City's express contractual commitment to play an active and financial role alongside it, as both parties acknowledged in writing was a necessity for the Project's feasibility.

15. The City also entered into a number of Interlocking Partnership Agreements, as hereinafter defined, governing the development and financing of such improvements, agreeing to partially fund, in exchange for certain enumerated deliverables, a project it expressly agreed was "not otherwise commercially viable."

16. In early 2014, the City approved a multi-tower urban development project consisting of parking, retail, housing and numerous public benefits (the "2014 Approval").

17. The 2014 Approval consisted of permit approval for all phases under the recently enacted "Master Development Plan" section of the City's site plan ordinance, as well as conditional use, site plan, traffic movement, subdivision and Site Location of Development Act approvals for Phase I of the Project.

18. As contemplated, the 2014 Approval would have activated surrounding street life on what was then, and is now, a vacant stretch of former industrial blight, and enlivened the Bayside Trail—a paved pedestrian path connecting to the City's popular Back Cove and Eastern Promenade trail systems, effectively shifting the center of downtown Portland northward.

19. The Project came under attack, however, when an administrative appeal of the 2014 Approval was filed in Superior Court during the winter of 2014 alleging numerous procedural and substantive errors in the City's decision-making process (the "Appeal").

20. The Appeal was principally aimed at the City's record of decision underlying the 2014 Approval, but Federated was consumed by the matter given its role as Project applicant.

21. Months later, after considering the allegations against the City, learning the City had deleted its mandatory meeting minutes related to one of the Project's public meetings, and funding a costly legal defense of the City's record of decision, Federated weighed the risks of protracted litigation and the potential jeopardy it could place federal contributions to the Project in, and reluctantly decreased the Project size, at tremendous cost to itself, as a means of settling the Appeal and in an effort to move the Project forward on a timely basis.

22. The City was well aware of, directly participated in negotiations related to, and tacitly approved of Federated's settlement of the Appeal through the many verbal blessings of the staff members involved.

23. As a result of the Appeal's settlement, it was agreed amongst the parties that a revised version of Federated's Project would be submitted for re-permitting, without the abandonment of the underlying Master Development Plan permit comprising the 2014 Approval.

24. The revised Project concept was attached to the Appeal's settlement and well understood by all involved at the time of the settlement's execution.

25. Before settling the Appeal, Federated met with City representatives in order to request, and in response it received, assurances, which it relied upon, that if the Appeal was settled as contemplated the revised Project could and would be processed quickly.

26. Thereafter, following multiple additional public hearings, staff meetings, and replacement of its design team, the City's planning board approved Midtown as the second iteration of Federated's project by a vote taken at a valid public hearing on March 3, 2015 (the "2015 Approval").

27. While the City planning board is independent from City staff, it largely relied upon an extensive list of pre-drafted staff recommendations in rendering the lengthy decision underlying its 2015 Approval.

28. The revised plan continued to embody the characteristics of a dense, urban and walkable neighborhood center, except in a low-rise configuration consisting of four buildings in the six (6) to seven (7) story range.

29. The 2015 Approval consisted of 450 residential units, nearly 100,000 gross square feet of ground floor retail space, and structured parking for more than 800 vehicles (the “Parking Garage”)—all to be constructed in a single phase.

30. In connection with the Project, Federated committed to directly design, construct, and pay one-third of the total cost for a major public street improvement project long planned by the City and intended to raise the height of adjacent Somerset Street by several feet in an effort to improve antiquated stormwater infrastructure and better configure the neighborhood’s road network.

31. The extent of Federated’s financial commitment to this public improvement project was well in excess of One Million Dollars (\$1,000,000.00), and Federated not only took on the task of having its third-party consultants fully design a public street for and at the direction of City staff, with little input of its own, it was also thereafter billed by the City for City’s staff’s review of this entirely public project.

32. In addition, Federated designed Midtown to dramatically enhance and widen the Bayside Trail by, amongst other things, inclusion of brick pavers as opposed to the basic asphalt then in place, and to install a new transit stop for public use, to expand proximately located sewer infrastructure, and to enhance nearby intersections and traffic signals.

33. In addition, the City reserved to itself, at the time of conveyance of the Property to Federated, numerous easements over the Project site, effectively depriving Federated from the use of same notwithstanding its payment for such property.

34. The Parking Garage, which for a period of thirty years was to have remained open to the public for general use and even snow ban vehicle storage, was a central component of the Project.

35. Federated accordingly paid painstaking detail to its design in order to ensure it (a) maximized efficiency, including through the inclusion of a significant bicycle storage requirement and related amenities, and (b) met a design standard suitable for its location.

36. As most recently contemplated, the Project would have generated substantial tax benefits for the City, as well as created significant temporary construction jobs in addition to permanent jobs related to, among other things, management of the related facilities and staffing of its expansive retail components.

37. And these benefits would have been significantly amplified in the Revised Project Concept, as hereinafter defined.

38. Federated fully underwrote, designed, and priced the Parking Garage with multiple reputable national construction managers, and as of Spring 2018 had nearly completely designed all other Project components as well – the process of which was temporarily suspended while related vendor contracts were renegotiated to reflect a Revised Project Concept, as hereinafter defined, in line with City guidance.

39. By March 2018, Federated had negotiated contracts with various environmental remediation and site-work firms for the initial steps required to prepare the Parking Garage site



within the larger Property (“Lot 6”) for construction in accordance with mandatory environmental cleanup plans impacting said site.

40. Before it could engage these firms, however, the City notified Federated it would not permit construction of the Project.

41. Had the City granted Federated a building permit prior to the expiration of its site plan approval, in March 2018, the Parking Garage was scheduled to have been completed in under eighteen months, by September 2019 at the latest.

42. The Parking Garage possessed all required State-level permits and its plans were 100% designed and approved by the City when the City denied its building permit.

### **The Interlocking Partnership Agreements**

43. On June 23, 2011, the City and Federated entered into a certain Purchase and Sale Agreement (the “PSA”) , attached hereto as **Exhibit A**, related to the four parcels and approximately 3.25 acres comprising the Property.

44. The PSA specified a per acre sale price, rather than a static price, in recognition of the likelihood that the Property’s legal description would change upon finalization of Midtown’s subdivision plat during the related Project entitlement process, as eventually occurred four years later by virtue of the 2015 Approval.

45. Under the PSA, the City was obligated to provide environmental insurance for the Property (the “Environmental Insurance”) in order to relieve it from deed restrictions imposed by a former grantor partially prohibiting residential use (the “Environmental Deed Restrictions”).

46. Aside from a non-binding email from an insurance agent nearly two years prior to denial of its building permit, Federated was never provided evidence of any Environmental Insurance as required before it could construct the Project.

47. The City also initially committed to remediating the Property directly itself and agreed to perpetually serve directly as the subdivision applicant for Federated's planned development.

48. Per the PSA, and as a means of enticing Federated to purchase the Property in a down market, the City agreed to fund a certain public parking facility, which would later become the Parking Garage, in order to serve the City, its residents and visitors as part of Federated's Project.

49. Federated consented to building said facility for the City's benefit, with the parameters thereof to be detailed at a later time and in a separate written instrument.

50. Under the PSA, various conditions preceded Federated's obligation to consummate the purchase and sale transaction contemplated thereby (hereinafter, the "Closing"), some of which were matters of practicality and others of which were expressly enumerated, including recordation of any subdivision plat required to convey the Property and receipt of a building permit—the latter of which was specifically negotiated by Federated to mitigate its associated risk.

51. Assuming such conditions precedent were met, the Closing was to have occurred, per the PSA, within thirty (30) days of the expiration of the 180-day timeline afforded to Federated following its inspection of the Property for receipt of Project permits.

52. Notwithstanding the foregoing timeline, pursuant to the PSA's conditions precedent to Closing section, in no event was Closing to occur earlier than Federated's receipt of a building permit for the Project.

53. On October 15, 2012, the City and Federated entered a certain Parking Garage Funding and Contribution Agreement ("Garage Agreement") related to the Parking Garage, as contemplated by the PSA. The Garage Agreement is attached hereto as **Exhibit B**.

54. In the Garage Agreement, the City agreed to contribute \$9,007,000.00 (“Grant Funds”) to Federated or its nominee toward development of the Parking Garage.

55. Under the Garage Agreement, Grant Funds were available for at least the specifically itemized purposes of the design, planning, permitting, environmental testing and remediation, and construction of the Parking Garage, as well as related purposes (collectively, the “Grant Uses”).

56. Subject to the full receipt of Grant Funds, Federated committed to constructing the Parking Garage in a specified period of time.

57. The City’s source of the Grant Funds originates under various grant(s) and/or loan(s) provided to the City by the U.S. Department of Housing and Urban Development (“HUD”) pursuant to the Maine BEDI Grant and Section 108 Loan Program.

58. The extent of HUD requirements and parameters for requisitioning and disbursing such funds were specifically established in and by the parties’ direct agreements, as opposed to by reference to any broader set of HUD or other requirements stated outside the context of the parties’ agreement.

59. In further consideration of the receipt of the Grant Funds, Federated committed to creating forty (40) new full-time permanent jobs within two (2) years of the issuance of a certificate of occupancy for the Parking Garage, which the parties documented by concurrently executing, together with the Garage Agreement, a certain Job Creation Agreement (“Jobs Agreement”). The Jobs Agreement is attached hereto as **Exhibit C**.

60. On the same date as the Garage Agreement and Jobs Agreement, the parties further executed a certain Corporate Guaranty Agreement (the “Guarantee”) which expressly states the

Grant Funds were offered to Federated in order to induce it to guarantee the construction of certain components of the Project.

61. The Guarantee, which is expressly contingent on the full payment of the Grant Funds, also establishes certain penalties for noncompliance, and is attached hereto as **Exhibit D**.

62. Also on October 15, 2012, Federated and the City executed that certain First Amendment to Purchase and Sale Agreement (“First Amendment”) wherein the parties acknowledged the Environmental Deed Restrictions prohibiting development of residential uses on the Property would be lifted by one of the prior owners of the Property in exchange for the City providing the Environmental Insurance. A copy of the First Amendment is attached hereto as **Exhibit E**.

63. Under the First Amendment, the City shifted the burden of the Property remediation that it failed to timely complete in breach of its contractual obligations to Federated, but agreed to contribute \$50,000 as the estimated cost of remediation to a commercial standard toward the completion thereof, and additionally increased the required size of the Parking Garage as well as detailed a modified repurchase remedy for failure to timely complete construction—which remedy was expressly conditioned on the City not being in default.

64. On October 14, 2014, Federated and the City executed that certain Second Amendment to Purchase and Sale Agreement and Amendment of Guaranty and Parking Garage Contribution and Funding Agreement, effectively entering a second amendment of the PSA (with regard to the related part of such agreement, the “Second Amendment”), first amendment of the Guarantee (with regard to the related part of such agreement, the “First Amended Guarantee” and, together with the Guarantee, the “Amended Guarantee”), and first amendment of the Garage Agreement (with regard to the related part of such agreement, the “First Amended Garage

Agreement”) (collectively, the “October 2014 Amendments”). Copies of the October 2014 Amendments are attached hereto as **Collective Exhibit F**.

65. Appended to the October 2014 Amendments was that certain “Agreement by and Between FEDEQ DV001 and City of Portland on Costs for Off-Site Improvements Improving Somerset Street, to be Partially Funded by City of Portland”, executed by the parties on the same date (the “Somerset Street Agreement”). A copy of the Somerset Street Agreement is attached hereto as **Exhibit G**.

66. In the Second Amendment of the PSA, the City acknowledged DV001 as a permitted assignee, transferring all rights under the PSA as amended, the Garage Agreement as amended, and the Jobs Agreement, to it, and insisted on leaving the Guarantee, as amended, with Legacy and TFC despite the virtual irrelevance of those entities to the Project at that point.

67. In recognition of the then-pending Appeal, the parties further expressly extended the “Permit Period,” originally defined in the PSA to mean 180 days following the buying entity’s initial sixty (60) day inspection of the Property, for a period of time (a) necessary to allow all permit appeals to be resolved, and (b) ending when the time period for further appealing any type of permit had expired (such date, the “End of Appeals”).

68. By extending the Permit Period, the parties simultaneously and knowingly clarified that the Closing date was expressly tied to receipt of all desired permits—previously absent from the calculation of the Closing timeline but nevertheless a condition precedent to Closing.

69. The City also again assumed responsibility for remediating the Property, which it agreed to do, but defaulted on its obligation to do, during the pendency of the Appeal.

70. In the Somerset Street Agreement, the parties agreed to a general scope of work for the related improvement, and further agreed that the timeline for completion of said scope was “TBD” for “to be determined”.

71. They further estimated a total project cost (“TPC”) of \$4 million, while simultaneously acknowledging said estimate may change in the future.

72. The parties agreed that Federated would pay for one-third (1/3) of the TPC, and the City would pay for two-thirds (2/3) of the TPC, in addition to the Grant Funds.

73. Included in the express definition of TPC are items such as design, staging, procurement, project supervision, permit fees, insurance and bonding costs in addition to actual construction.

74. Additionally, Federated agreed to deliver the City evidence of its financial capacity to the extent of 1/3 of the TPC, or \$1.33 million, prior to the issuance of a building permit for Somerset Street specifically, which entitlement it later confirmed was not required for site work improvements at all.

75. Federated further agreed to deliver a copy of its construction schedule to the City, prior to commencing construction.

76. In the First Amended Garage Agreement, in light of the Appeal, the parties extended the deadline for the initial disbursement of Grant Funds to the date falling one year after the End of Appeals and agreed upon an additional three months thereafter for the requisition of the first One Million Dollars (\$1,000,000.00) in Grant Funds.

77. They further agreed the Parking Garage would reach its so-called “start-up” phase (i.e., the point at which a certificate of occupancy for the parking portion thereof was issued) within two (2) years following such date.

78. On February 2, 2015, Federated and the City collectively amended the Amended Guarantee further (the “Second Amended Guarantee”) to update the original deliverables required thereunder in order to reflect the revised Project application, which was filed after settlement of the Appeal and ultimately resulted in the 2015 Approval. A copy of the Second Amended Guarantee is attached hereto as **Exhibit H**.

79. In addition, the parties agreed that, in light of the likelihood of final City planning board approval impacting the final legal description of the Property, they would execute an additional amendment to the PSA following such approval in order to properly document same prior to Closing.

80. On October 13, 2015, with the City’s assurance that staff would issue a construction permit for the Project once Federated met certain enumerated conditions, Federated voluntarily and without obligation agreed to proceed to Closing prematurely in order to alleviate what the City described as political pressure.

81. The parties documented this agreement by execution of that certain Third Amendment of Purchase and Sale Agreement (“Third Amendment”) which replaced the concept of a Closing date tied to the amorphous End of Appeals concept with a date certain of February 29, 2016 (the “Amended Closing Date”)—but only in the event such date fell at least thirty (30) days after the issuance of a building permit for the entire Project (the “Building Permit Condition”). A copy of the Third Amendment is attached hereto as **Exhibit I**.

82. In this amendment, Federated was granted a termination right by the City, with respect to the Third Amendment only, in the event the Building Permit Condition was not timely met.

83. In addition, the parties agreed Federated would take on full responsibility for remaining environmental remediation needs at the Property, relieving the City of its uncured and continuing default for want of timely completing this task during the pendency of the Appeal as required by the Second Amendment.

84. The City nevertheless remained responsible for the provision of the Environmental Insurance in order to release the Property from the Environmental Deed Restrictions.

85. On February 22, 2016, in recognition of the fact that the City had still not issued a building permit for the Project by the date which was thirty (30) days preceding the Amended Closing Date, and in an effort to avoid Federated's termination of the Third Amendment, Federated and the City executed that certain Amended & Restated Third Amendment of Purchase and Sale Agreement (the "Amended Third Amendment"), a copy of which is attached hereto as **Exhibit J**.

86. In it, the parties extended the date of Closing yet again, this time to April 29, 2016 (the "Second Amended Closing Date"), but again conditioned such date on the prior receipt of a construction permit for the entire Project.

87. On April 26, 2016, in recognition of the fact that the City had still not issued a building permit, Federated and the City executed a certain Second Amended & Restated Third Amendment of Purchase and Sale Agreement (the "Second Amended Third Amendment"), a copy of which is attached hereto as **Exhibit K**.

88. In it, the parties further extended the date of Closing to May 31, 2016 (the "Third Amended Closing Date").

89. On the Third Amended Closing Date, and again in recognition of the City's failure to issue a building permit for the Project, Federated and the City executed, after more than twenty two (22) negotiation iterations and a standoff resulting in further concessions from Federated



regarding recordation of the Amended Garage Agreement with the Property's conveyance deed, that certain Fourth Amendment of Purchase & Sale Agreement, Second Amendment of Parking Garage Contribution and Funding Agreement, & Third Amendment to Corporate Guarantee Agreement, effectively entering a fourth amendment of the PSA (with regard to the related part of such agreement, the "Fourth Amendment"), second amendment of the Garage Agreement (with regard to the related part of such agreement, the "Second Amended Garage Agreement"), and second amendment of the Guarantee (with regard to the related part of such agreement, the "Second Amended Guarantee" and, together with the Amended Guarantee, the "Amended Guarantee") (collectively, the "May 2016 Amendments"). Copies of the May 2016 Amendments are attached hereto as **Collective Exhibit L**.

90. In the Fourth Amendment, Federated and the City amended the Property's legal definition, as they had agreed to do under the Second Amended Guarantee following review and approval of the Project by the planning board as part of the 2015 Approval.

91. The parties further deleted the City's repurchase remedy under the PSA.

92. Finally, the date of Closing was extended once more, this time to June 16, 2016 (the "Fourth Amended Closing Date").

93. Unlike the dates established under the Third Amendment or its various amendments and/or restatements, however, in the Fourth Amendment Federated agreed to not condition the Fourth Amended Closing Date on receipt of a building permit for the Project, which decision was made in reliance on its receipt from the City of written confirmation detailing the remaining conditions precedent thereto—thus removing, or so Federated thought, any uncertainty with regard to the Property's buildability.

94. Under the Second Amended Garage Agreement, the City's repurchase remedy was narrowed to Lot 6 only.

95. Among other things, the parties also detailed in that amendment the cost to be paid in the event the City exercised its repurchase remedy, and agreed the Garage Agreement, as amended, would run with the title to the Property—to the benefit of Federated's successors in title without related City consent.

96. In the Second Amended Guarantee, the parties confirmed the narrowing of the City's repurchase remedy, and otherwise made minor adjustments to the Guarantee's structure.

97. In summary, the following agreements govern and are relevant to this dispute:

- a. The PSA, its First Amendment, Second Amendment, Third Amendment, Amended Third Amendment, Second Amended Third Amendment, and Fourth Amendment (collectively, the "Amended PSA") which governed the conveyance of the Property from the City to Federated. The terms of the Amended PSA expired at Closing except where specifically therein noted to the contrary;
- b. The Somerset Street Agreement, outlining the City's agreement to fund two-thirds (2/3) of the estimated \$4 million TPC for raising and improving the public thoroughfare adjacent to the Property;
- c. The Garage Agreement, as amended by the First Amended Garage Agreement and Second Amended Garage Agreement (collectively, the "Amended Garage Agreement"), which details the City's obligation to contribute \$9,007,000.00 in Grant Funds toward Federated's construction of the Parking Garage, as well as the various commitments made by Federated in consideration of such contribution;
- d. The Jobs Agreement mandating the creation of a specified number of permanent fulltime new jobs in exchange for receipt of the Grant Funds, and thereby transferring the City's related obligations to HUD to Federated; and
- e. The Amended Guarantee, specifying certain guarantees and obligating certain corporate entities with regard to specific events of non-performance in an effort to ensure sufficient tax revenue to service related City debt, but also expressly conditioned on receipt by Federated of the full amount of Grant Funds for the Project (the foregoing, collectively, the "Interlocking Partnership Agreements").

98. Through its execution of the Interlocking Partnership Agreements, and continuously throughout various meetings with Federated and others, the City has held itself out as, and in fact became, Federated's partner in the carrying on of a variety of business affairs related to the completion of the Project, from directly serving as the Project's subdivision applicant, to first assuming direct responsibility for and thereafter sharing the cost of the Project's required remediation, including responsibility for procuring and paying the premiums for the Environmental Insurance, to jointly funding a large portion of the Project intended to serve the public on a regular basis, to funding Federated's major reconstruction of existing and new City streets, and a variety of additional express and implied responsibilities.

99. The parties routinely referred to these Interlocking Partnership Agreements as the "partnership documents", both in writing and otherwise.

100. Federated's claims relate principally to clarification of rights under, the City's breach of, and bad faith dealings under the Amended Garage Agreement and the Somerset Street Agreement (such agreements, together, the "Relevant Agreements").

**Federated's Full Compliance with the Relevant Agreements**

101. Federated has fully and timely complied with and met each and every contractual obligation under the Relevant Agreements through the date of this Complaint.

102. Over nearly a decade, Federated met countless times with neighborhood groups and representatives as well as Property abutters in an effort to be a good neighbor and build consensus about the Project.

103. In addition, it timely proceeded with the permitting and entitlement of the Project both upon entering the PSA and then again following the costly and burdensome Appeal filed

against the City, which Federated oversaw and managed the defense of to the City's benefit at its own expense.

104. Federated worked with the City on the amendment of zoning necessary to construct its first iteration of the Project, drafting at its own cost and expense the City's new Master Development Plan section of its site plan ordinance, to the benefit of the City and the public at large.

105. Federated received conditional approval from the City's planning board on not one, not two, but three separate occasions, and thereafter worked diligently and tirelessly to clear an unprecedented number of conditions imposed thereon, exceeding 100.

106. Federated even went so far as to hire a former Portland planning board member with a law degree and background in urban planning as well as town management for the specific purpose of preparing the Project for construction and handling related matters.

107. Federated executed contracts and paid millions of dollars in connection therewith between itself and architects, landscape architects, civil engineers, geotechnical engineers, mechanical, electrical and plumbing engineers, a national construction company and an international structural engineer for the preparation of concept and feasibility, design-development and construction documents, as well as to oversee the pre-construction activities of the Project while a final construction budget and management contract were negotiated.

108. Federated designed the Parking Garage and Project in accordance with the Amended Garage Agreement and Amended Guarantee and took all steps within its control to construct the Parking Garage.

109. Federated designed and engineered improvement plans for Somerset Street, a City thoroughfare, providing its own capital and resources to advance funds for the same, in accordance

with the Somerset Street Agreement and the City planning board's conditional Project approval, and in seeking its still-unpaid reimbursement pursuant to said agreement followed all designated procedures related thereto.

110. Federated repeatedly requested, albeit in vain, to meet with City officials in order to work collaboratively with the City to control costs, as required under the Somerset Street Agreement.

111. Federated worked with its consultants and the City for years, spanning the period of time between December 2015 and March 2018, to refine its initial construction schedule in order to address City concerns with staging and logistics, resulting in more than a dozen submitted iterations of its construction management plan prior to its first conditional approval by the City, which to this date has still not been finally approved, mere days before the 2015 Approval expired.

112. Federated engaged the services of a reputable national leasing broker to procure retail tenants for the Project's ground floor commercial space, and said broker identified numerous interested tenants with which Federated entered into leasing discussions and negotiations, over many months, and likewise engaged numerous national and international hospitality franchises in discussions about prospective hotels on the Property prior to interest abating in the face of the City's public statements about the Project.

113. Federated prepared an updated American Land Title Association survey of the Property.

114. Federated closed upon its acquisition of the Property, paying millions of dollars to the City in cash, without a building permit in hand, in reliance on the City's representation that it would continue to work in good faith with Federated to timely process a building permit application for the Project in a prioritized manner.

115. Federated worked closely with, and paid thousands of dollars to, Central Maine Power to ensure sufficient electrical capacity and an appropriate related design for the Project.

116. Federated worked closely with the Portland Water District to determine utility connection charges for the Project, and to plan for same.

117. Federated worked closely with the City's assessing department to determine projected tax rates, and thus revenues, applicable to the Project, both during construction and upon stabilization, for purposes of ensuring the City could repay its loan to HUD.

118. Federated assumed responsibility for the remediation of the Property from the City, relieving the City of liability for the same, and worked closely with the U.S. Environmental Protection Agency to accomplish a valid transfer of related approved plans into its own name for implementation.

119. Federated obtained, at its own time and expense, a permit from the State of Maine Fire Marshal's office for the Parking Garage and paid its team of consultants to finalize application materials for submission of a building permit for the Parking Garage.

120. Federated renegotiated contracts, scopes of work, and related fees for services with its architects, engineers and others in order to design the Revised Project Concept in accordance with the City's suggestion and confirmation that an amendment to the Project's predecessor's Master Development Plan permit, as embodied in the 2014 Approval, was not only possible but in fact recommended by the City.

121. Upon learning the City had arbitrarily changed its mind with regard to the continuing validity of the Master Development Plan permit, Federated shifted its priorities, at great expense and to the detriment of its other business, in order to focus virtually exclusively on the

Project in order to receive approval to start construction before the underlying 2015 Approval expired.

122. Nearly two years after first submitting its plans for a building permit pre-review, which the City agreed to conduct as a means of inducing Federated to proceed to Closing without the actual issuance of a building permit, and after Federated reluctantly agreed to end a stalemate following the City's improper invalidation of the PSA, Federated paid the City hundreds of thousands of dollars in permitting and application fees in order to permit it to review said plans a second time, after the City lost the initially submitted plans, and with the expectation that a building permit for the Parking Garage would issue as a result thereof upon approval of related construction plans.

123. Given the passage of time from the Project's inception and the City's related inability to timely process Federated's related entitlements, as well as its failure to adhere to express and implied contractual obligations, Federated's ability to maintain the focus and attention of its many third party vendors was strained, an outcome in which the City played a direct role.

124. Nevertheless, Federated successfully retained the services of a pre-qualified third-party reviewer to expedite review of the Project's building permit application on behalf of the City—effectively paying twice to receive the expedited review the City previously offered for free in order to induce Federated to move forward with an expedited Closing timeline.

125. Federated completely satisfied all building design-related elements necessary for receipt of a building permit and negotiated with several reputable environmental and excavation firms to commence site work related to mandatory site remediation upon the issuance thereof.

126. Notwithstanding the fact that Federated never triggered a contractual need to do so, at the City's request Federated provided formal evidence of its financial and technical capacities,

regarding Somerset Street and/or the Project generally, as applicable, on numerous occasions, over the course of many years, through multiple financial institutions, and it worked with City staff members to fine-tune its first requisitions under the Relevant Agreements as deemed necessary, timely providing all required supporting documentation until the City was satisfied and made its initial disbursements.

127. On or about September 27, 2017, Federated filed a second requisition of funds dedicated to the project's Parking Garage ("Second Garage Requisition"), for the balance of funds requested (and previously approved) under its first requisition, within the time specified by said agreement.

128. Thereafter, as a result of the City's failure to pay the same, Federated timely and formally notified the City in accordance with the Amended Garage Agreement of its delinquency in satisfying same as well as related interest.

129. In 2018, Federated committed to proceeding with the Project and undertook steps to procure a manager for the Parking Garage upon its completion.

130. Federated worked in good faith to find multiple acceptable alternatives to the City's surprising last-minute demand that Federated post a significant cash escrow or letter of credit for the entire Project as a condition of the issuance of a building permit for the Parking Garage alone, which conflicted with years of written correspondence and the City's agreed upon role as the Project's subdivision applicant.

131. Federated entertained settlement discussions with the City that would permit alternatives to a zoning board appeal of the denial of its building permit application.

132. Federated appealed the City's denial of the Project's building permit application.



133. Federated issued correspondence which would have immediately cured any and all of its alleged defaults under the Relevant Agreements, while adamantly denying the existence of the same, as articulated by the City following denial of its building permit.

134. Federated attempted to further the remediation of the Property even after denial of its building permit, but in a continued pattern of obstructionist conduct the City refused to sign the necessary access agreement permitting Federated's vendors from accessing public portions of the Project site including a yet-to-be constructed City street, only to relent after Federated's contractor declined the work, and Federated missed out on available federal funding, as a direct result of the City's position.

135. Federated has remained in constant contact with the City about the Project's status and worked in good faith to entertain pre-suit alternative dispute resolution prior to the filing of this action, to no avail.

136. In sum, Federated has spent more than eight years and almost ten million dollars (\$10,000,000.00) related to the acquisition, development and preconstruction costs of the Project, in reasonable reliance on the City's numerous and repeated inducements and assurances that it remains fully committed to the Project, and Federated continues to incur significant carrying costs in the form of taxation, insurance, and responses to repeated City requests that it clean up the Property from vagrants, paraphernalia, and rubble conveyed by the City itself, while the City simultaneously declines to enforce posted signage on the Property or allow Federated to place a fence around it.

137. The City, which has received a significant net financial benefit from its sale of the Property to Federated, has in return refused to honor multiple prior statements made with the purpose and intent of inducing Federated to proceed, refused to work in good faith collaboration

with Federated, refused to honor the Relevant Agreements, refused to pay Federated monies it agreed were due and payable, intentionally or otherwise villainized Federated in local print and television media, and notwithstanding the above has also continued to use the Property for its own purposes.

**The City's Acknowledgment of Federated's Full Compliance**

138. The City ratified and confirmed the absence of default under the PSA time and again over the span of five separate years ranging between June 2011 and May 2016 when it ratified the continuing full force and effect of same throughout at least six (6) separate amendments.

139. Had Federated been in default as of Closing, the City would not have been obligated to convey the Property to it.

140. In 2015, the City implicitly conceded the PSA had not expired when it voluntarily amended it by virtue of the Third Amendment, and it further acknowledged Federated's full compliance with the terms of the PSA yet again when it later closed on its disposition of the Property via transfer and conveyance to Federated 04 and Federated 05 as the valid successors of DV001.

141. In the spring of 2017, in the context of starting applicable Project timelines under the Relevant Agreements, but without a required building permit in hand, Federated submitted an informal draft of its first requisition of Grant Funds under the Amended Garage Agreement demonstrating total costs expended to date but only requesting, post-retainage, the lesser amount of Nine-Hundred Ninety-Nine Thousand, Nine-Hundred Ninety-Nine Dollars (\$999,999.00) as an arbitrarily determined sum unrelated to specific expenditures.

142. Following feedback from the City, Federated resubmitted this document with adjustments made to the supporting backup material initially included therewith, without adjustment to the requested amount (the “First Garage Requisition”).

143. Pursuant to the Amended Garage Agreement, the City could not have disbursed any funds requisitioned by Federated unless and until Federated fully satisfied the related requirements as set forth therein; hence, the act of funding a requisition is tantamount to an acknowledgment of Federated’s full compliance with related obligations.

144. On or about June 27, 2017, the City funded Federated’s First Garage Requisition in the full amount requested, thus confirming Federated’s full satisfaction of and compliance with the Amended Garage Agreement.

145. Following its initial comments on the draft requisition, which were fully addressed, the City neither questioned nor disputed the balance shown in Federated’s First Garage Requisition above and beyond what was formally requested as an arbitrary subcomponent thereof.

146. Previously, on February 15, 2017, Federated submitted to the City its first requisition under the Somerset Street Agreement in the amount of One-Hundred Forty-Seven Thousand, Five-Hundred Twenty-Five Dollars (\$147,525.00) (the “First Somerset Street Requisition”).

147. Pursuant to the Somerset Street Agreement, the City likewise could not have disbursed any funds requisitioned by Federated thereunder unless and until Federated fully satisfied the related requirements as set forth therein.

148. The City initially objected to Federated’s First Somerset Street Requisition; however, after much dialogue and demonstration to the City by Federated that it was in fact in full compliance with the Somerset Street Agreement, and had been at the time the aforementioned

requisition was submitted, the City also funded the First Somerset Street Requisition, again demonstrating its acknowledgment that Federated had complied with related contractual obligations.

149. Following notices of default issued to Federated by the City's outside counsel in the spring of 2018, after the City's denial of Federated's building permit application, Federated responded in great written detail outlining precisely why each alleged default was improperly alleged, and it did so in a timely manner in line with the agreements to which such notices pertained.

150. Thereafter, the City did not re-allege default until nearly a year later when it alleged virtually the same grounds it had previously alleged, in total disregard of Federated's prior cure letters and its own implicit acceptance of the same.

### **Campaign to Obstruct the Project**

151. Since as early as 2013, outside forces have waged a constant, repeated, and vexatious series of attacks at an administrative level and in Superior Court in the form of the Appeal to impede or obstruct the development of Maritime Landing as the Project's predecessor and the Project's first, more dense, iteration.

152. While it was the City's planning board which entered the record of decision that was attacked in the Appeal, and while it did so in reliance on pre-drafted motions and conditions and other input directly from City staff, ultimately Federated took charge of the City's defense, defending the taxpayers of Portland from the City's own mistakes as the City merely piggy-backed on Federated's efforts.

153. For months, Federated funded the Appeal to defend against the forces of obstruction.

154. In doing so, Federated incurred substantial costs, fees, delays and other incidental damages, including financial loss from an ultimately scaled-back development with dramatically fewer units and a much more aggressive construction schedule, increased expenses associated with construction delays, rising construction costs, attorneys' fees and, later, revised zoning directly impacting the Project financials and an untimely City increase in building permit fees.

155. The obstructive efforts were spurred by a vigilant ad hoc neighborhood group—informally calling itself 'Keep Portland Livable'—the co-founder of which acknowledged openly in regard to the Appeal that “the power to delay is the power to destroy” with regard to the intent of the Appeal.

156. At each stage of the Appeal, the City burdened Federated by requesting and accepting its efforts, and Federated continuously defended the Project and the City's record of decision until ultimately settling with opponents in the interest of advancing an expeditiously delivered, albeit much smaller, housing project to the local community – which, at that time and still today, was suffering from a rental rate crisis the likes of which have not been seen in recent times.

157. The City was well aware of and participated directly in crafting the terms of the Appeal's settlement, including the revised design and nature of the Project, all of which complied with applicable regulations and, more importantly, the Interlocking Partnership Agreements.

158. As a result of the Appeal, an amendment of the Interlocking Partnership Agreements was necessitated, causing further Project delay, and the Project was further stigmatized.

159. Federated and its predecessors spent tens of thousands of dollars defending the Appeal so that the Project could move forward to the benefit of the City and its residents as originally contemplated.

**The City's Malfeasance, Bad Faith and Repudiation of the Relevant Agreements**

*Initial Permitting Problems*

160. After the Appeal, Federated unofficially inquired, in the spring of 2015, whether it could administratively amend a part of the 2015 Approval to include hospitality use, while still providing hundreds of residential units.

161. Hospitality is a use expressly permitted in the Property's zoning district, but it is also one which has become politically sensitive for the City in light of numerous recent hotel developments and the City's well-documented housing crisis.

162. In response, the City took the position that the Grant Funds were being contributed to the Project to catalyze new housing development, notwithstanding the fact that HUD precludes the source of those funds from being used for housing and the parties initially contemplated a wide range of uses of which housing was but one.

163. However, rather than debating Federated on the merits of its position, the City abruptly declared, on or about June 8, 2015 (the "June 8<sup>th</sup> Communication"), that the PSA was no longer in force or effect, due to an alleged expiration.

164. Federated promptly asked the City's in-house attorneys for an explanation but was ignored.

165. The City's economic development director thereafter advised Federated that before the City would entertain further discussions, he and the City's interim manager, its then-police chief, needed to update the City Council for guidance.

166. Following the City's June 8<sup>th</sup> Communication, Federated repeatedly asked for clarification from the City Council and senior City officials, with no explanation of the City's position or any indication as to whether the guidance being sought from City Council members was via a public or private forum.

167. The City thereafter refused to explain its position for several weeks, until it delivered formal correspondence late in the day on Friday June 19, 2015 (the "June 19<sup>th</sup> Communication"), leading Federated to reasonably conclude it was a means of preventing further discussion of non-housing project changes.

168. At virtually the same time as the City's June 8<sup>th</sup> Communication and June 19<sup>th</sup> Communication, the City was in final employment negotiations with, but had not yet hired, Mr. Jennings, a newcomer to city management and municipal work in general.

169. Mr. Jennings eventually started as the City's new chief administrative and executive official on July 13, 2015.

170. During Maine's short construction season, halfway through the one year period allotted to receive and commence construction under an already difficult-to-procure building permit, Mr. Jennings ordered his staff to completely stop reviewing the Project altogether, effectively ordering his staff to go "pencils down," and forbade them from even interacting with Federated or its many third-party vendors until further notice.

171. Federated's staff and entire development team was effectively put on hold for months.

172. While the clock kept ticking with regard to the dwindling window of time in which Federated could obtain a building permit, Federated's hands were completely and intentionally tied by the very same party expecting it to perform.

173. It was not until several months later, after Federated's hired outside counsel to demand performance and Federated reluctantly agreed to forgo its interest in exploring the addition of hotel uses in favor of an all-housing program, even though the same was not mandated by any of the applicable agreements governing the parties, and even though such use was expressly allowed under in-place zoning, that the City agreed to "amend" the allegedly expired PSA.

174. Around the same time, the City stated in writing that it would not recommence its permitting efforts until execution of such amendment, evidencing a willful and entirely improper exploitation of its status as reviewing authority for the purpose of gaining leverage over Federated in related but ultimately distinct contractual negotiations.

175. The City effectively held Federated's legitimate contractual and land use rights hostage, for the purpose of serving political ends not shared by Federated, by resort to its role as Seller of the Property—extorting a particular development scheme from Federated by use of inappropriate means.

176. Later in 2015, the City hired its own planning board chairman, an individual who has been critical of the Appeal settlement, the Project, and Federated both on record and in a public forum, as the director of its planning department—i.e., as the person chiefly tasked with overseeing the administrative review of conditions he had previously imposed during an arduous quasi-judicial decision-making process.

*Federated's Acquisition of the Property*

177. In 2016, the City approached Federated with a request to close upon its acquisition of the Property well before Federated was obligated to do so under its PSA.



178. As a compromise with the City, and in good faith, Federated agreed to proceed to Closing if the City would either (i) issue the Project a building permit, or (ii) itemize in no uncertain terms the remaining conditions standing between it and a construction permit.

179. The City chose option (ii), and did so, twice, in writing, first by letter dated June 1, 2016 confirming that the only remaining conditions of approval were (a) finalization of an acceptable construction management plan, and (b) certain enumerated fees (the “First Remaining Conditions Letter”), and by subsequent correspondence on formal City letterhead dated June 29, 2016, (the “Second Remaining Conditions Letter”) (together, the “Remaining Conditions Letter”), copies of which are attached hereto as **Collective Exhibit M**.

180. Nowhere did the City list a performance guarantee as a remaining condition of approval within the Remaining Conditions Letter.

181. Given the City’s prior waiver of that normal condition of all planning board approvals, to benefit itself and allow the sale of the Property to Federated by reference to a legal description citing its recorded subdivision plat, Federated rightly assumed said requirement had been waived outright, as expressly permitted by the City’s Code of Ordinances.

182. However, even if it had not been, the performance guarantee would have (a) been a responsibility of the City to post, both as the seller of the Property and as the expressly agreed upon subdivision applicant, and (b) would have conveyed to Federated at Closing under the terms of the PSA and by running with the title to the land.

*The Revised Project Concept*

183. In 2016, in recognition of the impossibility of having its construction management plan approved—due to what the City deemed unacceptable logistics of closing an entire street for the duration of a single-phase project, even though it was the same street the City required

complete reconstruction of—and in light of the fact that the City had proposed no workable alternatives, Federated informally approached the City about returning to a phased project similar in density, but shorter in height, as was first contemplated by the 2014 Approval (the “Revised Project Concept”).

184. The City expressed written excitement about the prospect of such changes, and its staff agreed they made sense for reasons including the circumstances surrounding the clearing of conditions associated with the 2015 Approval.

185. In fact, the City went so far as to recommend how the Revised Project Concept should be pursued when it steered Federated away from amending the 2015 Approval in favor of a recommendation that it be accomplished by amending the earlier Master Development Plan permit embodied in the 2014 Approval.

186. In conjunction therewith, the City expressly confirmed, in an email attached hereto as **Exhibit N**, that the 2014 Approval remained valid for several more years and could even be extended for a longer period of time administratively (the “MDP Confirmation Letter”).

187. In the same email, the City expressly stated that it was “committed to making [the Project] a reality and will do everything [it] can within [its] legal and administrative framework” to reach that end.

188. Just as it had relied on the City’s First Remaining Conditions when expending millions to acquire the Property ahead of schedule, it was in reliance on the City’s MDP Confirmation Letter that Federated approached the Appeal litigants, the neighborhood association, and others to build community support for the Revised Project Concept, and thereafter performed market studies, feasibility analyses, rent surveys and other due diligence while it completely renegotiated its third-party vendor contracts to incorporate entirely new scopes of work.

*Funding Refusal & Permit Denial*

189. In October 2017, following the valid and timely submission of the Second Garage Requisition and more than a year of discussions regarding the Revised Project Concept, the City abruptly stopped disbursing funds under the Amended Garage Agreement without explanation.

190. The City then advised Federated, months later, while advising it was facing internal pressure to advance the Project given its outstanding debt service obligations to HUD, that notwithstanding the MDP Confirmation Letter's verification of the 2014 Approval's continuing validity, after a change of heart it was no longer willing to consider the Master Development Plan permit active, effectively precluding the City's own recommendation that such permit be used as a means of implementing the Revised Project Concept which, by that time, Federated had been working on for years and remodeled its entire investment around.

191. Importantly, the planning board had not invalidated the 2014 Approval or therefore the associated Master Development Plan permit in granting the 2015 Approval, and nothing in the settlement of the Appeal changed this fact.

192. Further, there is nothing inherently or otherwise contradictory about the 2014 Approval's Master Development Plan permit and the 2015 Approval's subdivision or site plan approvals; in fact, the Master Development Plan section of the City's site plan ordinance is expressly intended to operate symbiotically with overlapping site plan approvals.

193. To make matters worse, the City notified Federated of this purported expiration only a matter of weeks before the 2015 Approval – and Federated's ability to preserve its entitlements by obtaining a building permit – expired.

194. Federated had previously been operating in reasonable reliance upon the City's confirmation that its entitlements were immune from near-term expiration given their preservation under the Master Development Plan permit.

195. The sudden and unexpected threat of expiration came with great cost implications for Federated; any post-expiration re-permitting of what was already a financially complex and historically controversial undertaking is subject to a plethora of new ordinance revisions enacted by the City well after investment decisions were made by Federated during the many years for which the Project was delayed—including a workforce housing or “inclusionary zoning” initiative mandating the artificial capping of certain Project rents and, accordingly, deflating the Project's projected returns.

196. As a result, Federated was forced to scramble in order to (a) apply for, (b) arrange for, and (c) pay for construction commencement in a matter of weeks simply to preserve what the City had determined in its questionable discretion to be the only remaining development rights for the Project.

197. In good faith, Federated negotiated with contractors to manage the construction of the Midtown project, released final construction design services, paid hundreds of thousands of dollars in application and review fees to the City, notwithstanding the City's theretofore unexplained failure to fund its own portions of the Project, worked painstakingly to refine its construction management plan, and remained in constant contact with the City regarding the Project through the end of the 2015 Approval's permit life.

198. Ultimately, however, notwithstanding this herculean effort and the fact that the Parking Garage's construction plans were fully approved from a design perspective, the City chose to deny Federated's building permit application.

*Refusal to Honor Waiver of Performance Guarantee Requirement*

199. The City's primary and only real basis for the denial was that Federated failed to post a performance guarantee for the entire Project, which the City claimed was a condition precedent to the issuance of construction entitlements and which it would only accept in the essential form of a full cash escrow covering all of the Project's site work.

200. In light of the City's refusal to decouple the public street improvement project Federated took on from its larger Project entitlements, this meant the amount of the guarantee was increased by several millions of dollars, to potentially as much as \$15 million or more worth of site improvements, even though the permit applied for only related to the Parking Garage and contemplated no public site improvements until later stages.

201. The City's denial letter cited other bases for denial as well, including expiration of the 2015 Approval and Federated's failure to pay certain fees, but they were pretextual in nature.

202. The 2015 Approval would not have expired had the City not required a performance guarantee—which would have allowed the timely issuance of a building permit—and Federated expressly advised the City that all remaining fees would be paid upon resolution of that outstanding issue.

203. In fact, Federated even paid the fees in full prior to retrieving its uncashed checks as a means of damage control after the City continued to insist on, and refuse to proportionally share in the cost of, an unreasonable performance guarantee requirement.

204. Federated advised the City in writing, on March 19, 2018, that the money for its remaining fees, which was initially paid in full, was being held locally and would be delivered promptly upon the City's "clearing remaining permitting hurdles"—the very same hurdles it was advised three calendar years earlier in the Remaining Conditions Letter were not at issue.

205. Requiring applicants to post a performance guarantee covering planned site improvements is typically a standard condition of approval prior to issuance of a building permit and also before a development's subdivision plat is released by City staff for recording at the Cumberland County Registry of Deeds.

206. Under Section 14-499 of the City's Code of Ordinances, this requirement not surprisingly applies to subdivision applicants.

207. For Federated's Project, the City expressly and contractually agreed to serve as the Project's subdivision applicant, and thus took on the responsibility of posting a performance guarantee, if it chose to require one.

208. Despite Federated's express written request, the City did not post a performance guarantee as the Project's subdivision applicant.

209. Instead, the City called Federated in default for even suggesting it should do so.

210. Further, Section 4 of the Somerset Street Agreement specifically states that the City would accept a contractor's bond, at the time of construction contract execution as opposed to prior to issuance of a building permit, in full satisfaction of the performance guarantee otherwise required by Section 14-501 of the City's Code of Ordinances.

211. Federated reminded the City of this in writing on March 1, 2018 but the City refused to honor this express contractual agreement.

212. The City's Code of Ordinances further grants the City express authority to waive the requirement of a performance guarantee and, as the City's actions and express confirmations illustrate, that is exactly what the City did for the Project.

213. Since the City desired to convey the Property to Federated long before it was able to grant Federated a building permit, and the legal description of the Property necessary for such

conveyance was tied to an unrecorded subdivision plat, the City intentionally, deliberately and permissibly waived the normally applicable rules, for its own benefit, so that it could reap millions of dollars in monetary benefits from divesting itself of the contaminated Property and related liabilities and save itself from paying the related sum prior to Closing upon its sale of the same to Federated in accordance with the Amended PSA.

214. In fact, in an email dated March 16, 2018, the City's then-planning director confirmed in writing that the City had done so for that purpose, and this aligns perfectly with the Remaining Conditions Letter.

215. The City's waiver had the effect of saving it from what by its own admission would have otherwise constituted the necessity of paying approximately \$15 million in Project site work expenses, in cash.

216. The First Remaining Conditions Letter was issued in direct response to Federated's request for an itemization of outstanding conditions of approval standing between it and the issuance of a building permit for the Project, and in the context of the parties' negotiation of the then-unexecuted Fourth Amendment.

217. The parties' contractual arrangement initially required Federated to close on its acquisition of the Property only after issuance of a building permit, a provision specifically bargained for by Federated in order to assure itself that the Property would be buildable before millions of additional dollars were spent acquiring it in vain.

218. In response to pressure from the City, however, and following the City's refusal to acknowledge Federated's express right to receipt of a building permit before Closing, Federated relented and agreed to proceed to Closing without a building permit in hand, notwithstanding the saga of permitting delays it had endured over the years, but only on the basis of the First Remaining

Conditions Letter, which in its exhaustive enumeration of remaining conditions precedent to the issuance of a building permit did not list a performance guarantee.

219. Federated was therefore shocked when the City advised that a performance guarantee, which it admitted in writing to waiving for itself, was all of a sudden a pre-building permit requirement—particularly where the parties expressly and contractually agreed the City would serve as the Project’s subdivision applicant.

220. In addition, Section 14-501(c) of the City’s Code of Ordinances requires the posting of a performance guarantee in the amount of 100% of the cost of related improvements “as determined by the public works authority and the planning authority”.

221. On January 28, 2018, in an effort to work with the City toward the advancement of the Project Federated requested the City determine and advise Federated of the amount of any required performance guarantee in accordance with its Code of Ordinances.

222. The City refused to determine or supply Federated with an amount for the performance guarantee it later insisted be paid by Federated notwithstanding (a) the City’s agreement to serve as the Project’s subdivision applicant and (b) its waiver of any guarantee requirement.

223. Further, when Federated suggested as a compromise that it be allowed to post a bond instead of paying an all-cash escrow for the entirety of a development both parties acknowledged was in the midst of being redesigned, the City refused to accept same, notwithstanding an express reference to bonding costs in the Somerset Street Agreement.

*Anticipatory Repudiation of Relevant Agreements*

224. In addition, just prior to the expiration of the 2015 Approval’s permit window, and well after Federated had expended hundreds of thousands of dollars pursuing a construction permit



on the assumption the City, even if reluctantly, would remain its partner in the Project, the City advised it no longer intended to honor any of its contractual obligations under the Relevant Agreements absent certain steps being taken by Federated (such correspondence, the “March 2018 Letter”), attached as **Exhibit O**.

225. The demands of the City’s March 2018 Letter were particularly confusing to Federated because (a) some of them failed to relate to any of the Interlocking Partnership Agreements, and (b) nearly all of them mirrored certain positions previously taken by the City but fully addressed by Federated in earlier correspondence leading up to payment of its First Somerset Requisition and First Garage Requisition in June 2017—the same requisition that triggered the time permitted for the Second Garage Requisition and, potentially, completion of the Project.

226. After acting as the architect of the Project’s demise, the City then sent Federated a letter dated April 12, 2018 (the “April 2018 Letter”), following the Project’s permit period expiration and building permit denial, alleging defaults across the board under the Relevant Agreements.

227. Confusingly, the City alleged Federated was in default for failing to commence construction of the Project within a “reasonable time,” notwithstanding the fact that the Amended Garage Agreement specified a date for completion, rather than commencement, of the Parking Garage, and even though the City had itself expressly denied Federated the right to do the very same thing it was complaining was not done.

228. The City’s April 2018 Letter also overlooked the fact that the Amended Garage Agreement specifically called for an express timeline for completion—i.e., not one unilaterally determined “reasonable” by the City.

229. The April 2018 Letter also alleged Federated was in default of the Amended Garage Agreement for failing to demonstrate its financial resources, notwithstanding numerous prior instances of same, and further notwithstanding the fact that, unlike the Somerset Street Agreement, there was no express condition requiring Federated to do so under the Amended Garage Agreement.

230. Perhaps most confusing of all, however, is the fact that the City's April 2018 Letter alleged a default by Federated for failing to follow proper disbursement procedures under the Amended Garage Agreement, even though the bases for its Second Garage Requisition, which represented the balance of expenses previously included in the First Garage Requisition, were previously and expressly approved by the City.

231. The City, in effect, approved and then "un-approved" the Second Garage Requisition, just as it had confirmed and then declined the Master Development Plan permit, waived and reinstated the performance guarantee, and stated no building permit was necessary for site work prior to conditioning commencement of site work on receipt of a building permit.

232. When Federated, in a last ditch effort to satisfy the City, consented to posting a performance guarantee in cash, as long as the City would contribute its own two-thirds (2/3) share thereof with regard to Somerset Street, the City refused but notified Federated it was waiving the guarantee for itself alone.

233. In the end, the City's refusal to honor its well documented waiver of the performance guarantee—confirmed directly by the City in writing no less than three times—or to timely honor the type of guarantee it otherwise expressly and contractually agreed to accept, and finally its refusal to share in the cost thereof, even after Federated conceded and agreed to pay its

own portion under protest, made receipt of a building permit—a goal supposedly shared by the parties for more than seven (7) years—a virtual impossibility.

234. In an effort to protect its interests, and in light of the lack of receipt of any certificate(s) evidencing the City's binding mandatory pre-construction Environmental Insurance for the Property—without which the Project would not be permissible to construct—Federated retrieved a portion of the financial fees it had previously issued checks for to the City in conjunction with its building permit application, but without withdrawing said fees or the related application, for safe keeping pending the City's reconsideration of its position.

235. The City never in fact reconsidered its position, and thereafter only refunded a small fraction of fees paid to it by Federated, supporting Federated's decision to safeguard additional funds while the Project's future remained in flux.

236. As a result, the City (i) denied Federated's building permit, (ii) based such denial on Federated's failure to comply with a waived-and-then-reinstated condition of approval as well as Federated's related safekeeping of funds specifically arising from that context, and moreover (iii) bafflingly alleged Federated's request for the City to share in the financing of such circumstances by funding its agreed upon portion of the performance guarantee was somehow a default under the Somerset Street Agreement.

237. In attempt to understand the City's position further, Federated requested, pursuant to Maine's Freedom of Access Act, various pertinent City records.

238. Those central to the issue inquired of were never delivered and, accordingly, either did not exist or were withheld without justification.

*Express Repudiation of Relevant Agreements*

239. Throughout the spring of 2018, in an attempt to resolve what was then the Project's latest impasse, Federated engaged the City's outside counsel on numerous occasions through countless email exchanges, telephone conversations, and exchanges of formal written correspondence in an attempt to explain its position and the reasons for it, as well as to allay any and all concerns held by the City.

240. On April 25, 2018, the City's outside counsel informed Federated that the City could consider a consent decree and related order issued by a Superior Court justice utilizing Federated's pending building permit appeal as a means of reactivating the disputed Project permits, as part of a negotiated settlement of what by that time had become an adversarial relationship.

241. She also advised, however, that the City had serious concerns about Federated's financial capacity to construct the Project and would not move forward without Federated first producing sensitive financial information well in excess of anything Federated was contractually obligated to furnish – an act that would merely permit further discussion as opposed to resolving the dispute with certainty.

242. She further advised Federated that short of Federated implementing the Project, which it could not do absent the City's permission, the City intended to pursue the reacquisition of Lot 6 under the Amended Garage Agreement so that another party could do so.

243. In line with this threatened approach, Mr. Jennings communicated to Federated that he had conversations with other developers interested in the Property about taking over the Project.

244. In fact, Mr. Jennings was even quoted in the Portland Press Herald as stating “hundreds of other developers” could have constructed the Project.

245. After conversations in the spring of 2018 failed to reach a mutually acceptable result, correspondence from the City's outside counsel was limited for several months as City administration re-engaged Federated directly in a series of conversations intended to discuss the future of the Project, including how it might be revived, and the Property more broadly.

246. On October 24, 2018, Federated had a teleconference with the Mr. Jennings as the City's manager and Greg Mitchell as the City's director of economic development wherein it explored a number of ideas for moving forward constructively notwithstanding the expiration of permits for the Project.

247. The City representatives on the call agreed to check with their staff with regard to the feasibility of certain approaches discussed and report back to Federated promptly so that further conversations could unfold in accordance with the feedback they received.

248. Despite repeated requests for a status update, the City did not respond to Federated for three months.

249. When it finally did so, on January 10, 2019, it was via formal correspondence again delivered on a Friday afternoon—continuing a pattern of behavior reflecting the abrupt delivery of controversial communications disparaging Federated without any meaningful opportunity for immediate response, beginning first with its faulty invalidation of the PSA in 2015 and continuing through its March 2018 Letter, among other examples.

250. This correspondence framed the October 24<sup>th</sup> call described above as one characterized by a series of developer demands which the City was unwilling to meet and concluded by a refusal to further discuss the Project.

251. Ironically, the demands allegedly made by Federated, including a suggested consent order to revive Project permits, were in fact suggestions first raised by the City's own legal team.

252. At this point, the City again referred the Project to its outside legal counsel for the "handling of all Midtown Project contractual requirements".

253. In response, Federated replied to the City manager suggesting the parties pursue non-binding alternative dispute resolution.

254. More than a month later, after the City's internal legal counsel continued to pepper Federated with threatened code enforcement actions in relation to matters including (a) the height of the grass on the Property, (b) rubble the City itself abandoned on the Property, (c) graffiti on a fence the City conveyed to Federated, and (d) syringes and other paraphernalia from transient drug users traversing the vacant site in light of the City's failure to enforce an express authorization to prevent trespassers, and after Federated again spent thousands of dollars in response to those threats, the City's outside legal counsel again delivered Federated a formal notice (the "February 2019 Letter"), attached hereto as **Exhibit P**.

255. The February 2019 Letter alleged Federated was in violation of the Relevant Agreements, sought assurance of compliance with said agreements, and threatened to repudiate same in the event such assurance was not received by March 15, 2019.

256. Confusingly, said letter once again recycled and set forth virtually the same arguments Federated had addressed without objection nearly a year prior, in addition to a year prior to that.

257. In effect, the City's February 2019 Letter regurgitated arguments it had been using for at least two years, as though Federated had never previously responded to the same.

258. While the City's February 2019 Letter overlooked its own previous failure and refusal to pay the Second Garage Requisition, which by that time had occurred nearly one and one-half years earlier, it was quick to threaten Federated with a breach of contract action with the express aim of re-taking title to the Property if Federated was unable to deliver the Parking Garage by September 27, 2019 – a date tied to the filing of the Second Garage Requisition and conveniently overlooking its failure to fund the same as a prerequisite for enforcement of any available remedies.

259. Specifically, the City indicated its intent to exercise its questionable rights under paragraph 9 of the Amended Garage Agreement, which provides a remedy for breach of said agreement in the event of a default which remains uncured for a period of ninety (90) days (hereinafter, the "Garage Remedy").

260. The February 2019 Letter overlooked that Federated's ability to deliver the Parking Garage by September 2019 was made virtually impossible by the City's continuing refusal to permit the very same work it was demanding the completion of. And it was moreover premature and contained a unilaterally truncated "cure" period, in direct conflict with the Relevant Agreements.

261. Federated responded, again in great detail, to the City's February 2019 Letter, via email dated March 4, 2019 and attached hereto as **Exhibit Q**, setting forth the reasons said letter was again baseless.

262. Subsequently, Federated's in-house counsel attempted to contact the City's outside counsel on numerous occasions prior to the deadline set forth in her February 2019 Letter, expressly advising that the window to resolve the matter was quickly closing, but was ultimately unsuccessful as the City was entirely, but characteristically, unresponsive to Federated.

263. The City's attorney stated she would not be in touch until she had direction from her client, after which she stated, in multiple emails over several days during the period she was ostensibly looking for assurance from Federated, that she had "not been able to connect with the city", was "having a terrible time connecting" with the Mr. Jennings as the City's manager, and coordinating with the City was "proving a challenge"—feelings Federated knows all too well.

264. Not until a week after the City's arbitrarily established deadline for repudiation of the Relevant Agreements did Federated finally hear back from the City, and only to the effect that the City would be willing to entertain alternative dispute resolution.

265. No response was received in regard to Federated's position regarding the substance of the City's February 2019 Letter.

266. Whereas the date set forth in the City's February 2019 Letter came and went with the City unwilling to so much as even discuss the matter with Federated, the City has in accordance with its own written confirmation expressly repudiated the Relevant Agreements.

*Permit Denial Appeal*

267. Following the denial of its building permit application, Federated in good faith timely undertook an appeal thereof to the City's administrative appeal board.

268. On June 21, 2018 said board heard Federated's application at a public hearing, at which the City's outside legal counsel and its internal legal staff were present.

269. At the hearing, in a last effort to save the Project, Federated's principal argument centered on the fact that, as written, Federated's permit window ran from the date of "final approval," rather than the date of final action, which conditional approval with more than 100 conditions could not possibly constitute.



270. Ultimately, however, the City's appeal board, as advised by counsel for the City, denied the appeal.

*Longstanding and Improper Delays by the City*

271. In addition to its anticipatory and later express repudiation of the Relevant Agreements as well as its overt failure and unreasonable refusal to continue funding requisitions under the Amended Garage Agreement and Somerset Street Agreement, the City has further breached the Relevant Agreements on a number of fronts related to its refusal to act in good faith as a Project partner, thus ensuring the impossibility of the very same outcome it seems at least ostensibly to be upset with the nonoccurrence of.

272. Moreover, where the City's duties as a reviewing authority and contracting party would ordinarily be separate, the City has conflated its two very distinct capacities throughout its partnership with Federated, consistently to Federated's disadvantage.

273. In repeated breach of its duties as a Project partner, the City delayed the normal permitting and approval process and improperly impeded the Project.

274. Standard site plan approvals expire within one year of approval by the City's planning board unless administratively extended, which they may be for a maximum period of up to an additional two years.

275. It took Federated, which had numerous vendors and multiple full-time staff members working exclusively on the Project, more than fifteen (15) months to receive City approval for a majority of the more than 100 discretionary, redundant and overly vague conditions associated with Midtown.

276. And it took years to have just one condition of approval in particular—its construction management plan—partially, and still conditionally, approved, which again occurred the same week Federated’s 2015 Approval expired.

277. In fact, at one point the City failed to respond to Federated’s submission of a draft of that plan for more than half a year, which failure occurred after the City had stopped working on the Project altogether the year before for several months in order to exert leverage over Federated in various contractual negotiations.

278. As a result of the City’s inexplicable inability to timely approve Federated’s construction management plan notwithstanding more than a dozen drafts thereof over three calendar years, Federated was afforded very little if any time to coordinate construction logistics in accordance with that document before expiration of its 2015 Approval.

279. In short, the City unreasonably waited until the last minute to approve the one document necessary to ensure construction could proceed in an orderly fashion, and even that approval itself was conditional.

280. Furthermore, notwithstanding the substantive nature and associated challenges of the Project’s conditions, the sheer number of conditions itself—which is unprecedented—demonstrates the City’s lack of support for the Project.

281. Recent projects of comparable size and complexity as the Project, but proposed by local developers as opposed to Florida-based developers, have had significantly fewer conditions attached to their planning board approvals, including for example the 2012 approval for the so-called “Forefront at Thompson’s Point” project, an approximately \$100 million development proposed by a company managed by the City manager himself prior to Mr. Jennings’ municipal

appointment, which covered a land area ten times the size of the Project and consisted of a mix of uses similar to the Project's, inclusive of hotel, office, restaurants and others.

282. Despite its massive size and intensity, this comparable project, proposed by a team of principals including Mr. Jennings, only had approximately twenty (20) conditions of approval—or one-fifth of those associated with Midtown.

283. By way of further example, the recently constructed “WEX” corporate headquarters, a major downtown office complex occupying an entire block in a congested area of the City, built for use by a large corporation previously located in the same municipality Mr. Jennings was the economic development director for, and which Mr. Jennings as the City's manager has been a vocal supporter of, had only 13 conditions of approval associated with it, compared to Midtown's more than 100—a figure approximately twice as high as even the Project's predecessor, the 2014 Approval, which related to a vastly larger development.

284. And for the March 29, 2018 approval of the State's largest hospital's major expansion of its downtown campus including vertical expansion of a primary tower and a large parking facility along one of the State's busiest thoroughfares, only approximately twenty (20) conditions of approval were attached by the City.

285. As showcased by the foregoing, while the Project may have been one of if not the largest in the State's history, it was certainly not without peers.

286. Whether in terms of size, cost or complexity, there have been numerous projects comparable to the Project approved by the City in the last decade.

287. Notwithstanding its similarities to other massive projects approved by the City in recent years, however, the contingencies attached to the Project's approval were an order of magnitude greater.

288. Even though the City administratively extended the Project's initial one-year timeline for site plan approvals to the maximum three-year timeline permitted by its Code of Ordinances, it did so not as a courtesy to Federated—which had been working diligently toward full Project approval—but instead as a result of its own actions, and in a manner that aligned with its own self-seeking ends.

289. The City initially extended the timeline for final approval for a period of one additional year, which allowed it to sell the Property to Federated, and for the second and last period of one additional year after that which caused Federated to draw down funds under its First Garage Requisition—starting a contractual timeline long desired by the City.

290. In summary, the City's planning board, acting in reliance on and in deference to written suggestions from City staff, imposed an inordinate and simply unheard of number of provisos and prerequisites on the Project's "approval", which conditions were drafted by the City itself, and the City thereafter hired the very same person who led the challenging planning board approval process, and who had been critical of the Project, as the person chiefly responsible for clearing that oppressive list of conditions, making the 2015 Approval all but a sham and virtually ensuring the Project would never be built.

291. The City then proceeded to ignore and at points refused to even interact with, Federated for months at a time, during Federated's many and well documented attempts to satisfy the outrageously excessive number of conditions associated with the Project.

292. But after the City virtually assured the Project of which it was so critical was impossible to fully permit and misled Federated to believe otherwise long enough to close upon its acquisition of the Property and draw down Grant Funds, it promptly pulled the plug on its partner.

*Damages*

293. As a direct result of the City's express repudiation of the Relevant Agreements, it has effectively brought the development of the Project to a halt.

294. Due to the City's failure to approve the Project's predecessor application in a manner defensible from attack, and as a result of its inability to timely permit the revised Project after burdening it with an unheard of number of conditions and ignoring Federated's attempts to satisfy the same, construction costs have increased dramatically and market demand has lessened, impacting Federated to the extent of tens of millions of dollars.

295. As a proximate cause of the City's breach of said agreements, Federated has incurred compensatory damages of more than Ten Million Dollars (\$10,000,000.00) in direct cash investment in the Property, the Project, and related vendors and consultants, as well as marketing materials, staff time, and similar expenditures.

296. Loss of expected profits are significantly and exponentially higher.

297. Neutral and conservative valuations of the Parking Garage alone indicate Federated has lost millions upon millions of additional dollars in expected revenue, and exponentially more in profit, due to the City's undermining of the Project.

298. Federated's extensive internal underwriting and cash flow projections indicate City obstruction of the Project further resulted in the loss of millions of dollars in expected revenue and profit in relation to the remaining residential portions of the Project as well.

299. An interested party which approached Federated about acquiring the Project site, in an unsolicited manner, dropped its offering price for the unimproved Property by Six Million Dollars (\$6,000,000.00) as a result of the City's publicly threatened legal actions against, and bad faith with respect to its dealings with, Federated.

300. Another party which had also expressed, again in an unsolicited manner, either acquiring the Property outright or partnering with Federated to construct the Project together, dropped its offer price by Two Million Dollars (\$2,000,000.00) and ultimately failed to move forward in any respect with regard to the Project due to the City's failure to honor its prior statement in the MDP Confirmation Letter.

301. The City's refusal to honor the remainder of its obligations under the Amended Garage Agreement deprived Federated of more than Eight Million Dollars (\$8,000,000.00) in partnership contributions on which Federated relied when purchasing the Property and designing a project both parties expressly agreed was not otherwise commercially viable.

302. While Federated has expended millions toward the initial construction efforts of the Project, the City's bad faith actions have clearly stifled additional equity and other financing interests in the Project.

303. As a result of the City's many public statements about Federated and the Project, by way of its highest executive and elected officials, Federated has also suffered damages to its reputation and goodwill, with an impact on its unrelated business affairs as the owner of significant national commercial real estate holdings as well.

304. As the result of the significant passage of time arising from the City's Obstruction, as hereinafter defined, Federated lost the ability to construct the Project or its predecessor at dramatically lower construction costs, and forfeited years of related cash flow.

305. As a result of the City's conduct surrounding the performance guarantee, Federated has been damaged from the City's failure to convey the full amount thereof, which should have been paid prior to Closing by the City itself, at the time of conveyance of the Property, or by the City's requirement that Federated pay such amount on its behalf.

**CAUSES OF ACTION**

**COUNT I – BREACH OF CONTRACT  
Amended Garage Agreement**

306. Federated restates and realleges paragraphs 1 through 305 as if restated herein.

307. The Amended Garage Agreement is and at all times relevant hereto was a valid and enforceable contract.

308. Federated has fully complied with all of its duties and obligations under the Amended Garage Agreement, including but not limited to fully designing the Parking Garage as a compliant structure, entitling said Parking Garage through the City's planning board, coordinating with third-party utility providers, hiring staff to manage leasing and construction affairs, timely applying for a building permit to construct the facility, negotiating various construction and remediation contracts to implement related cleanup and construction work, receiving construction design approval from the City's approved third-party plan reviewer, paying hundreds of thousands in related City review and permitting fees, filing its First Garage Requisition in a manner fully approved by the City, filing its Second Garage Requisition in the time required, repeatedly assuring the City in writing of its technical and financial capacity on multiple occasions, pursuing financing for construction commencement, and in good faith making itself available at virtually any time including on weekends and recognized holidays for cooperative discussions with the City regarding the advancement of this element of the Project.

309. Nevertheless, in breach of its express contractual obligations, and without explanation, the City stopped disbursing funds under the Amended Garage Agreement in October 2017, following the Second Garage Requisition, and thereafter anticipatorily breached the Amended Garage Agreement when it delivered Federated the March 2018 Letter, after which it

finally repudiated the Amended Garage Agreement expressly as of March 15, 2019 by way of its February 2019 Letter.

310. Through its February 2019 Letter, the City is purporting to exercise its Garage Remedy in an effort to retake possession of Lot 6 from Federated.

311. Through its March 2018 Letter and February 2019 Letter, the City has clearly and positively indicated that it will not comply with its express obligations under the Amended Garage Agreement.

312. The foregoing expressions confirm the City's prior discontinuation of compliance under the Amended Garage Agreement, and default thereunder, dating to October 2017, when it failed to fund Federated's Second Garage Requisition, and accordingly Federated fully anticipates the City will continue to not comply with its obligations under the Amended Garage Agreement.

313. Federated is entitled to treat the City's failure to pay its Second Garage Requisition, after previously approving the bases of same, as well as the City's anticipatory breach as stated in the March 2018 Letter, and finally its actual repudiation of the agreement in the February 2019 Letter, as immediate breaches of the Amended Garage Agreement.

314. The City's actual breach, anticipatory repudiation, and express repudiation of the Amended Garage Agreement, as well as its threatening conduct in relation thereto, are and will be to the direct detriment of Federated and have cost Federated to lose the millions of dollars it has spent to date on the Project along with the Project's value and Federated's reasonably expected profits.

315. As a direct and proximate cause of the City's breach by failure to fund the Second Garage Requisition, its anticipatory breach in the March 2018 Letter, and now its express



repudiation in the February 2019 Letter, Federated has suffered damages including those described in paragraphs 259 through 268 above.

316. In addition to money damages, to which Federated is entitled, Federated is also due injunctive relief.

317. The City's actions and threatened actions have caused Federated to suffer irreparable injury which so long as the Amended Garage Agreement continues to encumber the Property, and the Amended Guarantee continues to be enforceable, cannot be remedied absent the grant of injunctive relief.

318. Federated has protectable interests deserving of immediate protection and has a substantial likelihood of success on the merits.

319. Since the City has already drawn down the Grant Funds from HUD, and is already paying interest thereon irrespective of whether said funds are held or paid to Federated, the further injury that will come to Federated in the absence of injunctive relief outweighs any harm that an injunction would inflict upon the City—none.

320. The granting of injunctive relief would reflect a favorable balancing of relevant hardships.

321. So long as the Amended Garage Agreement continues to encumber the Property, the public interest will be furthered by enjoining the City from further breaching and attempting to wrongfully terminate it together with Federated's private property rights in Lot 6.

WHEREFORE, Plaintiff prays that judgment be entered against Defendant City of Portland as follows:

A. Enter judgment against the City and in favor of Federated awarding Federated damages, including but not limited to compensatory and lost profits, in an amount according to proof, together with the costs and fees associated with this action;

B. Enter a preliminary injunction enjoining and restraining the City, its agents, servants, staff and attorneys, and all others in active concert or in participation with it from:

- a. Altering Federated's quiet enjoyment of the Property;
- b. Prohibiting Federated from entering into leases related thereto; and
- c. Enforcing any deadlines established within the Amended Garage Agreement for completion of the Parking Garage, to the extent the same have or may have been triggered under said agreement, while this matter is pending and for a period of time running two years from the City's actual disbursement of the Second Garage Requisition, after a building permit is granted, unless and until the Amended Garage Agreement is rescinded.

C. Enter an Order suspending any deadlines for the completion of the Project or Parking Garage component thereof as specified in the Amended Garage Agreement, Amended Guarantee, or any of the other Interlocking Partnership Agreements discussed herein while this matter remains pending and for a period thereafter equating to the date which is two years after the City's satisfaction of the Second Garage Requisition and issuance of the necessary building permits, unless and until the applicable agreements are rescinded;

D. Grant any necessary equitable relief in order to remedy the harm done, including any necessary writs;

E. Award reasonable attorneys' fees and related court costs; and

F. Grant such other and further relief as the Court may deem just and proper.

At the appropriate time, Federated may also seek leave to assert claims for punitive damages.

**COUNT II – BREACH OF CONTRACT**  
**Somerset Street Agreement**

322. Federated restates and realleges paragraphs 1 through 321 as if restated herein.

323. The Somerset Street Agreement is a valid and enforceable contract.

324. Federated has fully complied with all of its duties and obligations under said agreement.

325. Under Sections 2 and 4 of the Somerset Street Agreement, the City agreed to fund two-thirds (2/3) of the cost of performance guarantee expenses, while under Section 3(d) it also agreed to make all disbursements pursuant to compliant requisitions within fifteen (15) days of receipt.

326. Under Section 2 of the Somerset Street Agreement, demonstration of financial capacity by Federated is only a condition to the issuance of a building permit, not disbursement of funds.

327. Importantly, the City confirmed in writing that it did not issue “building” permits for site work improvements, like the Somerset Street improvement project. Nevertheless, it chose to enforce the requirement of financial capacity demonstration at a time of its unilateral and arbitrary choosing.

328. Under Section 2(b) of the Somerset Street Agreement, the City agreed to meet with Federated in order to manage construction costs, including permitting expenses, and to continue to work “collaboratively” and “cooperatively” with Federated for such purposes.

329. The City breached the foregoing obligations when it (i) attempted to unilaterally amend the Interlocking Partnership Agreements by adjusting the cumulative guarantee obligations thereof to its own benefit and to the detriment of Federated, notwithstanding its prior waiver thereof, prior to issuance of a building permit for the Parking Garage, (ii) unreasonably declined

to fund Federated's Second Somerset Requisition within fifteen (15) days of its filing, (iii) refused, by way of the March 2018 Letter, to continue funding any disbursements under the Somerset Street Agreement until Federated provided assurances to the City which, pursuant to the express terms of said agreement, were premature at such time, and (iv) not only failed to cooperatively collaborate with Federated for the purpose of finding common ground on construction and permitting expenses, but in fact, at the level of its highest administrative official, completely ignored Federated's many repeated and well-documented written and other requests to engage in such dialogue.

330. Pursuant to the March 2018 Letter and the February 2019 Letter, the City clearly and unambiguously indicated that it will no longer fund Somerset Street Agreement requisitions.

331. As a direct and proximate result of the City's breach of the Somerset Street Agreement, Federated suffered damages including but not limited to the denial of its building permit and corresponding expiration of its site plan permit, which expiration has directly adversely impacted expected Project profits in addition to costs associated with the delay of any re-permitting of the Project, and costs associated with the City's failure to permit the Project arising from the lack of a performance guarantee the City should have partially funded if in fact it was required.

WHEREFORE, Plaintiff prays that judgment be entered against Defendant City of Portland as follows:

- A. Enter judgment in favor of Federated and against the City;
- B. Award compensatory and lost profits damages to Federated, as well as pre-judgment and post-judgment interest, in an amount according to proof, together with the costs and fees of bringing this action;

C. Require that the City, unless and until the Relevant Agreements are rescinded, specifically perform under the Somerset Street Agreement, by cooperatively collaborating with Federated on Project costs and related matters as well as allowing a bond in lieu of cash escrow or letter of credit to satisfy any performance guarantee now or hereafter applicable to the Project, if any; and

D. Award Federated any further relief that the Court deems equitable and just.

At the appropriate time, Federated may also seek leave to assert claims for punitive damages.

### **COUNT III – DECLARATORY JUDGMENT Amended Garage Agreement**

332. Federated restates and realleges paragraphs 1 through 331 as if restated herein.

333. Section 4(a) of the Amended Garage Agreement provided Federated three months from the date of its First Garage Requisition, i.e., until September 27, 2017, to draw down the first One Million Dollars (\$1,000,000.00) in Grant Funds for any Grant Uses.

334. Section 4(b) of the Amended Garage Agreement also specifies that the two-year timeline for Federated to reach the so-called “start-up” phase of construction of the Parking Garage (“Substantial Completion”) is not triggered until Federated requisitions the first One Million Dollars (\$1,000,000.00) in Grant Funds, specifically for “Garage construction” as but one of multiple permitted Grant Uses.

335. Federated has not commenced construction of the Parking Garage and, accordingly, none of its requisitions under the Amended Garage Agreement relate to construction costs, as would be required to start the two-year timeline for Substantial Completion.

336. The Amended Garage Agreement further clarifies that since the parties expressly agreed construction of the Parking Garage was not commercially viable absent the City’s full

contribution of the Grant Funds, the triggering of applicable timelines tied to requisition dates assumes, naturally, a corresponding payment of Grant Funds associated therewith before applicable timelines commence.

337. Section 1 of the initial Garage Agreement expressly states that Substantial Completion runs “from the date on which a total of \$1,000,000.00 in City Grant Funds has been requisitioned. . . .**and disbursed.** . . .” (emphasis added).

338. The City also expressly agreed, in Section 2 of the initial Garage Agreement, which section has not been modified in subsequent amendments, that the Grant Funds would represent the first money spent on the Parking Garage.

339. Notwithstanding this agreement, the City elected to, without apparent reason or accompanying explanation, discontinue disbursing the Grant Funds while simultaneously attempting to hold Federated to an obligation of reaching Substantial Completion tied to the date of its Second Garage Requisition.

340. Federated was under no obligation to file the First Garage Requisition on June 27, 2017, but after incurring costs for more than half a decade it agreed to do so voluntarily, in good faith and without a financial need therefor, in response to pressure from the City which had conditioned its compliance with other aspects of the Relevant Agreements on commencement of relevant Project timelines.

341. Thereafter, Federated fully complied with its obligation to timely file the Second Garage Requisition thereafter which, again, merely sought the balance of funds initially requested and approved for payment in the First Garage Requisition.

342. After fully approving its construction plans, but denying a construction permit on the basis of an arbitrarily waived-then-reinstated performance guarantee precondition, and thus

making delivery of the Parking Garage by any point in time an impossibility absent a change in its own conduct, the City took the position that the deadline for completion of the Parking Garage continues to run from the date funds were requested even though, again, the City failed to fund the related requisition and expressly and contractually acknowledged in writing that the Parking Garage is not commercially viable absent the Grant Funds.

343. Section 2 of the Garage Agreement states, in pertinent part, that the Grant Funds are “being provided in part as an incentive to build the Garage **which would otherwise not be commercially viable**” (emphasis added).

344. At all times relevant to the Project and including with respect to attempts to start construction of the Parking Garage, Federated used good faith efforts to proceed in a timely fashion from the date of its First Garage Requisition and, thereafter, from the date of its Second Garage Requisition.

345. These efforts included multiple unanswered inquiries to the City, in writing, with regard to the status of payment of the Second Garage Requisition, as well as its application for a building permit and finalization of Parking Garage construction plans within weeks of the City notifying it that it had arbitrarily changed its mind with regard to the continuing validity of the longer-term Master Development Plan permit associated with the 2014 Approval.

346. Although Federated was unsuccessful in obtaining the building permit necessary for the Substantial Completion of the Parking Garage by the date which is two years following its Second Garage Requisition, even if the Amended Garage Agreement required Federated to base the timeline for delivery upon the date thereof as the date on which the first One Million Dollars (\$1,000,000.00) in Grant Funds were drawn down for *any* of the Grant Uses, as opposed to specifically for construction purposes, where the City failed to fund said requisition, or even

explain why it had done so, while simultaneously acknowledging in writing that it was necessary for the Parking Garage to be commercially viable—thus depriving Federated of several months in which it could have cured or remedied any perceived deficiencies in its request—the City was undeniably the first party to breach the Amended Garage Agreement.<sup>1</sup>

347. Such circumstances do not and cannot constitute a default by Federated under the Amended Garage Agreement.

348. Federated has complied with all obligations incumbent upon it arising under the Amended Garage Agreement and ancillary components of the Interlocking Partnership Agreements.

349. The City, through its February 2019 Letter and preceding communications, including the March 2018 Letter and April 2018 Letter, issued Federated a series of default notices and expressly repudiated the Relevant Agreements (collectively, the “Default Notices”).

350. In its February 2019 Letter, the City, in addition to repudiating the Relevant Agreements, expressly noted its intention to seek a repurchase of Lot 6 in accordance with the Amended Garage Agreement.

351. The Default Notices have given rise to a genuine, present and actual controversy concerning Federated’s compliance with the Amended Garage Agreement.

352. As a consequence, Federated is in doubt of its rights, status, obligations, powers and privileges under the Relevant Agreements, and even under its deed to Lot 6.

353. There is a bona fide, actual, present and practical need for the Court to issue a declaration as to the interpretation and enforceability of the Amended Garage Agreement and the rights of the parties thereunder.

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<sup>1</sup> Federated strongly disputes the allegation that it has also breached the Amended Garage Agreement, and for the avoidance of doubt this averment should not be construed to the contrary.



354. The rights, status, obligations, powers, and privileges of Federated under the Relevant Agreements are dependent upon the Court's adjudication of the present controversy.

355. All parties with antagonistic or adverse interests are properly before the Court.

WHEREFORE, Plaintiff prays that judgment be entered against Defendant City of Portland as follows:

A. Declare that Federated has complied with all applicable provisions of the Relevant Agreements with respect to its obligations, requirements and deadlines to (i) request funds for, and (ii) start or commence construction of the Project arising thereunder;

B. Declare that there has been no event of default or breach by Federated under the Relevant Agreements with respect to Federated's obligations, requirements and deadlines to start or commence construction under the Relevant Agreements;

C. Declare that the bases for default asserted in the Default Notices are invalid;

D. Award Federated its attorneys' fees and costs incurred in connection with this cause; and

E. Award Federated all other and further legal and equitable relief that the Court deems just and proper.

#### **COUNT IV – DECLARATORY JUDGMENT Somerset Street Agreement**

356. Federated restates and realleges paragraphs 1 through 355 as if restated herein.

357. While Federated appealed to the City during the Project's permitting and entitlement efforts to decouple the Somerset Street improvement project—a public infrastructure undertaking for which no planning board approval or building permit was required—from the larger Project permits, the City refused, alleging the Project and street improvement work were

too closely interrelated and causing Federated to incur massive third-party costs related to the negotiated design of said improvements with City staff and Project abutters.

358. Federated accordingly required a building permit before it could have constructed the work contemplated by the Somerset Street Agreement.

359. While there is no timeline specified expressly for completion of the work required under the Somerset Street Agreement, under Federated's construction management plan approved by the City in March 2018 the City expressly acknowledged and consented to such work commencing no sooner than between six (6) and nine (9) months following commencement of the Parking Garage.

360. Less than one month after approving such a start date, however, the City then declared Federated in breach of the Somerset Street Agreement, by way of its April 2018 Letter, for failure to *complete* the same work it approved, literally weeks before in Federated's construction management plan which clearly outlined this work would not even commence until several months later.

361. The City's April 2018 Letter alleged that Federated had defaulted under the Somerset Street Agreement for failure to follow the disbursement procedures therein, as a result of its second requisition thereunder ("Second Somerset Requisition"), for the purpose of funding the City's performance guarantee.

362. However, Section 4 of the Somerset Street Agreement states, in pertinent part, that Federated's contractor was responsible for delivering to the City a "**performance bond . . . for the full amount of the Contract. . . .**"

363. Section 1 of the Somerset Street Agreement requires the parties to pay their proportionate shares of the TPC.

364. The TPC, in turn, very clearly includes, to the extent it is determined to not have been later waived, the cost of a performance guarantee.

365. The City therefore alleged Federated was in default for asking the City to fund an obligation the City expressly agreed to fund.

366. Notwithstanding the indisputable prematurity of its claim, the City's April 2018 Letter further alleges Federated defaulted under the Somerset Street Agreement for failure to appropriately demonstrate its financial resources in accordance therewith to the extent of one-third of the street improvement cost.

367. Section 2 of the Somerset Street Agreement clearly and unambiguously provides that demonstration of Federated's financial capacity is a contractual obligation due at the time of issuance of a building permit for the scope of work specifically associated with the contemplated Somerset Street improvements, rather than a precondition to the issuance of such permit, or to the disbursement of funds under the Somerset Street Agreement, and under no event would failure to deliver it constitute an event of default.

368. Notwithstanding the foregoing, on no less than three occasions, and outside the context of its application for a building permit, the City protested Federated's requisitions under the Somerset Street Agreement on the basis that it had not sufficiently demonstrated its financial capacity.

369. The City further based its allegation of default for want of financial capacity demonstration on the fact that Federated had not timely commenced the project, even though the City itself had sole control over such timing.

370. The City alleged that it was concerned about Federated's financial standing given the structural changes it baselessly alleged took place in Federated's business affairs.

371. Federated voluntarily demonstrated through a number of financial institutions and intermediaries, on multiple occasions spanning several years, that it had more than sufficient financial capacity to construct the Project.

372. In fact, its financial standing has dramatically improved since the Somerset Street Agreement was executed.

373. The City alleged that Federated had defaulted under the Somerset Street Agreement for its failure to follow certain HUD “guidelines” articulated in the Code of Federal Regulations.

374. However, notwithstanding any further requirements the City itself may be subject to as a recipient of loan funds from HUD, the Somerset Street Agreement itself only obligates Federated to comply with certain enumerated labor and employment regulations of HUD—and none of them are triggered until on-site construction commences, which at the time of this Complaint is an impossibility.

375. Further, the “regulations” cited by the City in its April 2018 Letter are in fact merely “guidelines” and, as such, are suggestive recommendations for direct grant recipients rather than mandatory requirements for ultimate grant beneficiaries.

376. Under no circumstances would failure to follow such suggestions constitute a default under Federated’s entirely separate contract with the City.

377. In its February 2019 Letter, the City again alleged that Federated was in default of the Somerset Street Agreement, but this time added as a basis for such conclusion that it had not provided a timeline for the related work.

378. However, Federated not only provided a timeline in the form of its construction management plan, but the City in fact acknowledged the provision of this timeline by virtue of its approval of the same, which was delivered to Federated in writing.

379. The Default Notices, and specifically the March 2018 Letter, have given rise to a genuine, present and actual controversy concerning Federated's compliance with the Somerset Street Agreement.

380. Federated is in doubt of its rights, status, obligations, powers and privileges under the Somerset Street Agreement.

381. There is a bona fide, actual, present and practical need for the Court to issue a declaration as to the interpretation and enforceability as to the Somerset Street Agreement and the rights of the parties thereunder.

382. The rights, status, obligations, powers, and privileges of Federated under the Relevant Agreements are dependent upon the Court's adjudication of the present controversy.

383. All parties with antagonistic or adverse interests are properly before the Court.

WHEREFORE, Plaintiff prays that judgment be entered against Defendant City of Portland as follows:

A. Declare that Federated has complied with all applicable provisions of the Somerset Street Agreement with respect to its obligations, requirements and deadlines to (i) demonstrate its financial capacity, as applicable, and (ii) provide a timeline for commencement of construction;

B. Declare that there has been no event of default or breach by Federated under the Somerset Street Agreement with respect to Federated's obligations, requirements and deadlines to start or commence construction of the street improvement work required thereby, or with respect to its Second Somerset Requisition or otherwise;

C. Declare that the bases for default asserted in the Default Notices are invalid;

D. Award Federated its attorneys' fees and costs incurred in connection with this cause; and

E. Award Federated all other and further legal and equitable relief that the Court deems just and proper.

#### **COUNT V – FRAUDULENT INDUCEMENT AND MISREPRESENTATION**

384. Federated restates and realleges paragraphs 1 through 383 as if restated herein.

385. The City fraudulently induced Federated to proceed to Closing upon its acquisition of the Property, well before it was obligated to do so, in reliance on its issuance of the First Remaining Conditions Letter, which documented previous verbal representations prior to the execution of the Fourth Amendment and contained false representations to the extent the subsequently enforced obligation to post a cash performance guarantee in the total amount of the Project's site work was omitted therefrom.

386. Given its later insistence on the existence of a performance guarantee as a condition of approval, the City at all times knew or should have known that the representations contained in the First Remaining Conditions Letter, as confirmed in the Second Remaining Conditions Letter, both of which confirmed the absence of any such condition, were false and untrue.

387. The City issued the First Remaining Conditions Letter for the sole purpose of inducing Federated to close upon the Property before it was contractually obligated to, on the basis of the representations and omissions contained therein.

388. Federated, in justifiable reliance on the First Remaining Conditions Letter and the truth of the material fact that it, like the Second Remaining Conditions Letter, confirmed the lack of any further conditions precedent to obtaining a building permit beyond those specifically enumerated therein, was damaged by the City's actions to at least the extent that it gave up the valuable right to condition a Closing on the Property and the associated expenditure of multiple millions of dollars on its receipt of a building permit.

389. Further, the City's MDP Confirmation Letter, wherein it confirmed the long-term continuing validity of the 2014 Approval's Master Development Plan permit in the context of permitting a future amendment thereof without permit expiration, likewise turned out to be a false representation of material fact.

390. The City knew, on the basis of Federated's express comments, that Federated was reimagining parts of the Project in the form of the Revised Project Concept, as a way of making approval of its construction management plan—which had theretofore been impossible to receive City approval of—and thus implementation of related construction, a more seamless and efficient process for all involved.

391. In related discussions with Federated, the City expressly suggested that Federated pursue amendment of its prior Master Development Plan permit as opposed to Federated's then-preferred approach of amending its then in-place site plan permit as embodied in the 2015 Approval, for the sole purpose of causing Federated to pursue that course of action and/or to refrain from amending its site plan permit, which eventually lapsed as a result.

392. In justifiable reliance on the MDP Confirmation Letter's contents as true, valid and enforceable, Federated acted thereupon and renegotiated all of its applicable vendor contracts, re-conceptualized the Project, and reconfigured its entire approach to the Project timeline.

393. However, as confirmed by the City's retraction of the position it previously stated in the MDP Confirmation Letter, when it advised Federated mere weeks before its site plan permit expired, in January 2018, that it had inexplicably changed its mind, the City either knew that the representations in its MDP Confirmation Letter were false or proceeded in issuing such correspondence with reckless disregard for whether they were false or not.

394. As a result of the City's misrepresentations in the MDP Confirmation Letter, Federated spent significant time in vain restructuring its design team, exploring project concepts and pursuing various market and other analyses which were later deemed not feasible without an entirely new permitting process, which process would evaporate Federated's exempt status from harmful regulatory modifications enacted after the Project's inception, and was hampered in its ability to resolve issues that eventually precluded issuance of a building permit for the Project and the related expiration of its 2015 Approval due to the City's last minute decision to truncate its construction permitting window.

395. This cause of action is not subject to or therefore precluded by the Maine Tort Claims Act, 14 M.R.S. Sec. 8101, *et. seq.*, because it does not seek damages against the City.

WHEREFORE, Plaintiff prays that judgment be entered against Defendant City of Portland as follows:

A. Rescind the Relevant Agreements and other Interlocking Partnership Agreements, to the extent same remain applicable, due to the City's misrepresentations and unfair and deceptive acts, which have rendered the Project an impossibility;

B. Award Federated its attorneys' fees and costs incurred in connection with this cause; and

C. Award Federated all other and further legal and equitable relief that the Court deems just and proper.

**COUNT VI – BREACH OF THE IMPLIED COVENANT  
OF GOOD FAITH AND FAIR DEALING**

396. Federated restates and realleges paragraphs 1 through 395 as if restated herein.

397. Since Midtown's inception, Federated placed a great deal of trust and confidence in the City to advance the Project in good faith and to act cooperatively and collaboratively with



Federated as required by the Relevant Agreements as well as the Interlocking Partnership Agreements more broadly.

398. Time and again, the City also affirmed its commitment to and support of the Project outside of a contractual context, through written and other statements from its chief administrative official and senior staff members including, as but one example, the MDP Confirmation Letter which stated “we are all committed to making this project a reality and will do everything we can” to make it happen.

399. Due to the City’s dual role as seller of the Property and contract partner, on the one hand, and permitting and reviewing authority for the Project on the other, a great disparity existed between Federated and the City as its partner.

400. By virtue of the foregoing and the City’s status as a financial partner in the Project, a fiduciary relationship existed between the City and Federated.

401. Notwithstanding this fact and the City’s many disingenuous comments to the contrary, following the settlement of the Appeal it became apparent the City was displeased with the revised, smaller, less dense version of Midtown—and commenced an obvious campaign to intentionally scuttle the Project, in bad faith, through continuous acts of obstruction repeatedly erring on the side of Project delays and impediments rather than collaboration and support, including but not limited to by:

- a. the City’s fabricated expiration of the PSA, which correlated directly with the timing of Federated’s attempt to discuss an entirely legal but politically sensitive partial change of use for the Project, which it failed to explain the bases of for *weeks* after notifying Federated of same late on a Friday afternoon in the middle of its permitting efforts;
- b. the City Manager’s confirmed directive to his staff to stop reviewing the Project’s conditions of approval for several months in an admitted effort to exert leverage over Federated in related contract negotiations by inappropriately utilizing the City’s overlapping role as permitting authority to benefit its role as land seller and contract partner;

- c. the City's unreasonable inability to approve Federated's proposed and continuously revised construction management plan, a condition precedent to receipt of a building permit, *for more than two years*, and its refusal at times to even respond to Federated regarding said plan for more than half a year;
- d. initially refusing to fund the First Somerset Requisition partially on the basis that Federated had not demonstrated its financial capacity, even though evidence of same had been delivered to City staff in writing *on multiple prior occasions* without so much as an acknowledgment of receipt, and certainly without objection, and even though such action by Federated was not a contractual precondition to disbursement of funds;
- e. the City planning director's statements to Federated in the winter of 2018, as Federated expended hundreds of thousands of dollars to procure a building permit notwithstanding the fact that the City had discontinued its financial contributions months earlier, that the City was "done with" the Project, that Midtown was "heading to litigation", and that "as usual [Federated's principal] doesn't know what the [expletive] he is talking about";
- f. the City planning director's staff being directed not to speak or correspond with Federated unless it was channeled through said director;
- g. the City Manager's prohibition of the City's planning director from communicating with Federated except for in writing;
- h. the City's decision to characterize the MDP Confirmation Letter as nothing more than a "preliminary conversation" even though it was aware Federated had completely re-conceptualized the Project in reliance on it over a year prior;
- i. the City Manager's refusal to (a) explain why the Second Garage Requisition was not funded, or (b) even engage Federated in conversations about the same despite written requests on at least five separate occasions, all of which were ignored and went without response of any kind;
- j. the City's refusal to honor its waiver of the performance guarantee requirement, notwithstanding two written confirmations that it was no longer a condition of approval, one written admission that the City had waived it for itself in order to proceed to Closing, and express authority under its Code of Ordinances to issue such a waiver coupled with an email from its planning staff stating they would do "everything [they] can to make [the Project] happen", and the City's oversight of the fact that in any event it, as the Project's subdivision applicant, rather than Federated, was responsible for posting the performance guarantee;
- k. indicating in writing that no building permit was necessary for site work to be undertaken, and then on a separate occasion indicating site work would preserve Federated's entitlements for the Project if commenced in a timely fashion, only to later arbitrarily change course and take the position that a building permit was, in fact, required for site work after all; and

1. the City's acceptance of Federated's building permit application and hundreds of thousands of dollars in related permit fees for the Parking Garage, a component of the Project the City acknowledged was not commercially viable without the Grant Funds, at a time when the City, unbeknownst to Federated, had not only neglected to fund, but had in fact determined it would not be funding the Second Garage Requisition (collectively the "City's Obstruction").

402. The components of the City's Obstruction outlined above represent the culmination of a laundry list of less significant but still obstructionist behavior, arising from a clear bias against the Project following its post-Appeal redesign, ranging from the City counsel's failure to object to its own planning board member admitting to conducting online research about the Project—to which the rest of the board was not privy—during the Project's entitlement stage, to City staff refusing to consider specific Project materials which the Interlocking Partnership Agreements specifically contemplated, to the City's planning director, in his capacity as former planning board chair, sarcastically congratulating a Federated employee on his new job "working for" Jonathan "Peter" Monroe, one of the Appeal plaintiffs—in apparent disapproval of Federated's decision to settle the Appeal instead of further defending the Appeal.

403. The Project's apogee was limited to a brief period of time between execution of the PSA and the 2014 Approval.

404. Thereafter, upon settling the Appeal, Federated presented the revised Project for reasons outside of its control, whereupon the City's obvious displeasure, and corresponding unwillingness to work cooperatively with Federated, began and has only grown since.

405. The long pattern of the City's Obstruction amounts to a direct breach of the covenant of good faith and fair dealing implicit in this transaction by virtue of the City's fiduciary relationship to Federated as a partner in the Interlocking Partnership Agreements.

406. This cause of action is not subject to or therefore precluded by the Maine Tort Claims Act, 14 M.R.S. Sec. 8101, *et. seq.*, because it does not seek damages from the City.

WHEREFORE, Plaintiff prays that judgment be entered against Defendant City of Portland as follows:

A. Rescind the Relevant Agreements and other Interlocking Partnership Agreements, to the extent same remain applicable, due to the City's Obstruction constituting a nearly continuous breach of the implied covenant of good faith and fair dealing applicable to Federated's partnership with the City;

B. Award Federated its attorneys' fees and costs incurred in connection with this cause; and

C. Award Federated all other and further legal and equitable relief that the Court deems just and proper.

**COUNT VIII  
TORTIOUS INTERFERENCE WITH A CONTRACTUAL RELATIONSHIP**

407. Federated restates and realleges paragraphs 1 through 406 as if restated herein.

408. Throughout the month of June 2015, the City was being managed by its police chief ("Police Chief") as an interim chief executive, following the departure of the City's prior interim chief executive.

409. At the same time, the City was concluding negotiations with finalists for the position of new incoming City manager, and eventually made an offer to Mr. Jennings.

410. Prior to his commencement of employment as a City employee, Mr. Jennings took a direct and active role in the Project's trajectory.

411. Although his tenure with the City did not commence until mid-July 2015, Mr. Jennings held multiple discussions with Federated and City staff members, including the Police Chief as interim City manager, throughout June 2015.

412. On June 26, 2015, weeks before starting as City manager, Mr. Jennings even met with Federated in person to discuss the Project and his soon-to-be staff in depth.

413. Prior to his commencement of employment, Mr. Jennings was actively directing City staff members with regard to the Project.

414. In a June 2015 meeting with Federated, the Police Chief acting as the City's interim manager advised Federated that Mr. Jennings contacted him to inform him that Federated reached out to and met with Mr. Jennings to discuss the Project.

415. The position held by the Police Chief is and was a direct report to the position Mr. Jennings assumed in July 2015.

416. The position held by the City's economic development director, which individual drafted the June 19<sup>th</sup> Communication, was also a direct report of the position Mr. Jennings assumed in July 2015.

417. Direct reports are subject to performance reviews by their superiors, in this case Mr. Jennings.

418. By means of intimidation arising from his incoming status as the direct supervisor of both the Police Chief, acting as interim City manager, and the City's economic development director, as author of the June 19<sup>th</sup> Communication, Mr. Jennings acted in a personal non-City employee capacity when he procured the breach of the PSA, a breach which but for his direct involvement would not have occurred, and proximately damaged Federated thereby.

WHEREFORE, Plaintiff prays that judgment be entered against Defendant Jon P. Jennings as follows:

G. Enter judgment against Mr. Jennings and in favor of Federated awarding Federated damages, including but not limited to compensatory and lost profits, in an amount according to proof, together with the costs and fees associated with this action;

H. Grant any necessary equitable relief in order to remedy the harm done;

I. Award reasonable attorneys' fees and related court costs; and

J. Grant such other and further relief as the Court may deem just and proper.

At the appropriate time, Federated may also seek leave to assert claims for punitive damages.

Dated: August 16, 2019

Respectfully Submitted

/s/ Allison A. Economy

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